TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulation Involved	4
Statement of the Case	5
A. Background	5
B. The Teachers Pay Act, P.L. 86-91 Is a Prevailing Wage Statute	6
C. Failure of Appropriations Cannot Extinguish the Government's Debt	18
D. The District Court Predicated Its Judgment Vitiating the Substantive Pay Act Upon the DOD's Comment in a DOD Authorized Regulation	21
E. Prior Litigation	22
Reasons For Granting the Writ	23
Conclusion	27
Appendix	1a-55a
Appendix A: Decision of The District Court	1a-5a
Appendix B: Decision of IV Circuit Court of Appeals	6a
Appendix C: Statutes and Regulation Involved	
(a) Pertinent Portions of The Teachers Pay Act, P.L. 86-91	7a
(b) Public Law 86-91 in full The Teachers Pay Act	8a-17a
(c) Pertinent Portions of Appropriation Acts	18a
(d) Portions of Directive 1400.13 Issued October 15, 1959	19a
(e) Regulation—Salary Determination Procedures, August 31, 1960	20a-23a

Page

Appendix D: Table of Salary Schedule Averages in the United States, H. Rep. No. 519, 89th Congr., 1st Sess. 1964 (p. 11) 24a

Appendix E: Portions of Appendix on Appeal to the IV Circuit Court of Appeals 25a-27a

Appendix F: Notice of Appeal to IV Circuit 28a

Appendix G: Decision of the Court of Claims Referred to in Decision of the District Court (in full) 29a-55a

INDEX OF CITATIONS

CASES:

Ballou v. Kemp, 92 F.2d 556 (U.S.C.A., D.C.) 20

Crawford v. United States, 179 Ct.Cl. 128; 376 F.2d 266 (1967), cert. den. 389 U.S. 1041 (1968) ..22, 29a-55a

Lovett v. United States, 66 F. Supp. 142, 104 Ct. Cl. 557 (1945), aff'd on other grounds, 328 U.S. 303 (1946) 18

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129; 56 S.Ct. 397; 80 L.Ed. 528 .....21, 22

Mitchell v. McNamara, 122 U.S.App.D.C. 224; 352 F.2d 700 (1965) 22

New York Airways, Inc. v. United States, 369 F.2d 743 (Ct.Cl. 1966) 19, 20

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292; 57 S.Ct. 724; 81 L.Ed. 1098 (1937) 25, 26, 27

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969) 15

Strong v. United States, 60 Ct.Cl. 627 (1925) 18

United States v. Langston, 118 U.S. 389 (1886) 18, 19

United States v. Vulte, 233 U.S. 509 (1914) 18

39 Comp. Genl. (1959) 8, 9, 21

CONSTITUTION OF THE UNITED STATES:

Article V 5

Fourteenth Amendment 5, 26

Page

STATUTES:

Appropriation Act of October 17, 1963 (77 Stat. 264, § 506 (1963)) 10, 16
Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959), 5 U.S.C. §§ 2351-58 ..... 3, 4, 5, 6, 7, 10, 13, 15, 16, 22, 24, 7a-17a
Department of Defense Appropriation Acts for the fiscal years 1953-1966 ..... 4, 18a
Public Law 86-568, 74 Stat. 298 (1960) 25
Public Law 87-793, Sec. 502(b), 76 Stat. 841 (1962) .. 25
Public Law 88-519, 78 Stat. 699(1) 2
Public Law 89-391, 80 Stat. 117, 5 U.S.C. § 2353(c) .. 13, 15

28 U.S.C. § 1254(2) 2
28 U.S.C. § 1346(d) 2

REGULATIONS:

Department of Defense Directive 1400.13, issued on October 15, 1959 ..... 4, 19a

Department of Defense Salary Determination Procedures, of August 31, 1960 ..... 4, 5, 16, 20a-23a

ADMINISTRATIVE AND LEGISLATIVE MATERIAL:

39 Comp. Genl. 422 (December 1959), Decision B-139880 ..... 8, 9, 21
House Report No. 357, 86th Cong. 1st Sess. (1959) .. 7
House Report No. 1329, 88th Cong. 2d Sess., p. 27 (1964) 7, 16, 17
House Report No. 519, 89th Cong. 1st Sess. (1965) ... 5, 7, 13, 24a
House Report No. 1871, 86th Cong. 1st Sess. (1959) 7, 16, 17
House Report No. 1607, 87th Cong. 2d Sess. (1963) 10, 11, 12, 13
House Report No. 6845, 89th Cong. 1st Sess. (1966) .. 13, 14
House Report No. 439, 88th Cong. 1st Sess. (1964) 11, 12, 13
105 Cong. Rec. 12711 (July 6, 1959) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

HOMEZELL CHAMBERS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The named Petitioners, on behalf of themselves, and on behalf of approximately 20,000 similarly situated persons, respectfully pray that a writ of certiorari issue to review the judgment entered against them by the United States Court of Appeals For The Fourth Circuit on January 5, 1971, affirming the judgment of the United States District Court For The Eastern District of Virginia of November 21, 1969.

OPINION BELOW

The Opinion of the District Court is unofficially reported at 306 F. Supp. 317, and is reproduced in Appendix A, to this Petition. The Opinion of the Circuit Court of Appeals is reproduced in Appendix B to this Petition; same has not yet been officially reported.

JURISDICTION

On November 21, 1969, the United States District Court For The Eastern District of Virginia (Civil Action No. 4106), issued its order and memorandum opinion denying plaintiffs' (petitioners') motion for summary judgment, granting defendant's motion for summary judgment; said order and judgment was entered November 21, 1969, a copy of which is annexed hereto at Appendix A, pp. 1a-5a. Plaintiffs timely filed a Notice of Appeal to the United States Court of Appeals For The Fourth Circuit on January 16, 1970, a copy of which is annexed hereto at Appendix F, p. 28a. The appeal was argued November 11, 1970 and decided January 5, 1971, affirming the judgment below. A copy of the Court of Appeals decision is annexed hereto at Appendix B, p. 6a.

The United States District Court had jurisdiction under 28 U.S.C. 1346(d) as amended August 30, 1964 by Public Law 88-519, 78 Stat. 699(1).

This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. 1254(2).

QUESTIONS PRESENTED

The principal question presented is:

> Whether, if both Houses of Congress cannot constitutionally enact legislation segregating creditors of the Federal Government into preferred and secondary creditors, can the Secretary of Defense accomplish this very result by administrative fiat, reducing statutory salaries?

Petitioners rendered services as classroom teachers in the Overseas Dependents Schools operated by the Department of Defense (hereafter "DOD") during the years 1960-1966. Their salaries were clearly es-

tablished by a substantive Pay Act, "The Department of Defense Overseas Teachers Pay And Personnel Practices Act" (hereafter the "Teachers Pay Act" or "Pay Act"), Public Law 86-91, as amended, 73 Stat. 213 (1959), 5 U.S.C. 2351-58. This is a prevailing-wage-rate statute, mandating overseas teachers' salaries in relation to those prevailing in the United States for similar positions.

The Secretary of Defense refused to pay rates in relation to those prevailing in the United States on the premise that he had discretion to establish whatever rates he deemed adequate if he merely anticipated that future appropriations might not be sufficient to fully pay all other items of school expense.

The teachers' position was that where salaries are governed by statute the employer is not excused from paying such rates because of any budgetary problems the employer might have, whether real or fancied.

The Secretary of Defense paid all other school personnel their full statutory salaries in accordance with other pay acts governing their compensation, that is, to principals, school superintendents, headquarters staff, clerical staff, bus drivers, janitors and others. All other creditors, suppliers, were paid in full. Teachers were the only creditors singled out by the DOD not to be paid in full, or in accordance with statute.

The teachers contended that where salaries are governed by statute the employer is obligated to pay statutory rates without regard to the employer's budgetary problems, whether real or fancied.

Without conceding that insufficiency of appropriations excused the debt, in order to demonstrate to the court that appropriations were, in fact, sufficient for all purposes, petitioners interposed interrogatories requesting records to establish actual school costs for

the years in question, to which the DOD replied that records establishing school costs—whether actual costs, estimated costs or approximate costs—were unavailable. (Appendix E, pp. 25a-26a).

Thus, even though the Secretary's position for downgrading teachers' salaries, was based on the premise that a mere anticipation of insufficiency of appropriations conferred discretion to substitute his own rates in place of statutory rates, the court's decision is that the Secretary has discretion NOT to pay statutory rates whether insufficiency of appropriations is a fact or is not a fact.

Accordingly the principal question presented is:

Whether administrators of a Government Agency have the power or discretion to segregate creditors of the United States into 100% preferred, and secondary creditors, on the premise that it is convenient to do so in order to achieve an artificial bookkeeping balance of the Agency's budget.

The foregoing Question unavoidably includes other questions, such as: Whether insufficiency of funds, real or imaginary, can discharge authorized obligations of the United States, and whether administrators can veto Acts of Congress by agency regulations and thus deprive persons of their property without due process.

STATUTES AND REGULATION INVOLVED

The statutes and regulations involved in this case are set out and cited in Appendix C, *infra,* as follows: the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959) Appendix pp. 7a-17a; the Department of Defense Appropriation Acts for the fiscal years 1953-1966, Appendix p. 18a; the Department of Defense Directive 1400.13, issued on October 15, 1959, Appendix

p. 19a; and the Department of Defense Salary Determination Procedures, of August 31, 1960, Appendix pp. 20a-23a; and also Article V and the 14th Amendment to the Constitution.

STATEMENT OF THE CASE

A. Background

This case brings to this Court a controversy that has been raging for a score of years concerning the underpayment of statutory salaries for approximately 20,000 teachers who are or have been employed in schools operated overseas by the Department of Defense ("DOD" hereafter) for the education of children of United States Government personnel stationed abroad. The pay periods involved are for the years 1959-1966.

The teachers' salaries were established on a prevailing wage basis, comparable to salaries prevailing in the United States for comparable services and similar duties, by the Department of Defense Overseas Teachers Pay and Personnel Practices Act (hereafter the Teachers Pay Act, or the Act), Public Law 86-91 (1959), set out in pertinent part in Appendix C-a, *infra.*

The salaries for other school personnel (for principals, superintendents, administrative, clerical, custodial help, et al.), were governed by other pay acts.

Teachers' salaries were computed by the DOD Wage-Board at substantially lower rates than required by the terms of the Teachers Pay Act (Appendix D, p. 24a, Table of Salaries 1959-1965, House Report No. 519, 89th Congr., 1st Sess. (1965), p. 11).

It was stipulated that all school personnel, other than Petitioner teachers, were paid full statutory salaries in accordance with pay acts applying to them,

and that all other school expenses (for supplies, transportation, etc.) were fully paid. Appendix E, p. 26a, Stipulation of Facts Records on Appeal, p. 103.

The DOD's sole excuse for paying substantially less than provided in the Teachers Pay Act, was:

If teachers would be paid full Teachers Pay Act rates the DOD might not be able to pay other school personnel their full statutory salaries and at the same time also pay other creditors, such as suppliers, in full. Appendix E, p. 26a, Stipulation of Facts, item 20.

B. The Teachers Pay Act, P.L. 86-91, Is a Prevailing-Wage Statute

The Teachers Pay Act, Public Law 86-91 is a Prevailing Wage statute, mandating rates "in relation to" rates comparable to those for similar positions in the United States. In most pertinent part, the Act provided the following substantive standard critical to this case:

> "The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States . . . ."

In addition, the Act provided that:

> ". . . the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern—
>
> * * * * * * * * *
>
> "(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States; . . ."[1]

---

[1] Sections 5(c) and 4(a) of the Act, set out in Appendix C, p. 7a.

The foregoing language, mandating a substantive standard for teachers' salaries, is clear and unambiguous on its face and is susceptible of only one interpretation. There is nothing in the legislative history[2] or in the Report (House Report No. 357, 86th Cong., 1st Sess. (1959))[2] subordinating payment of the specified rates to administrators' satisfaction or dissatisfaction with future appropriations with which to meet *other* items of school expense.

The Act precludes any suggestion that Congress intended to condition, or key, teachers' salaries to aggregate appropriations for the school program. Nothing in the Act itself, nothing in subsequent Appropriation Acts, remotely suggests the conferral of discretion on administrators to deviate from the explicit standard provided in the Pay Act, or authorizing administrators to substitute lower rates of compensation deemed by them to be sufficient or adequate.

We know of no Federal Pay Act which keys salaries to subsequent appropriations, whether the pay act includes a specific schedule indicating specific dollar amounts per position, or when employees' salaries are computable according to a formula or standard in

---

[2] *Legislative Materials*

Hearings on H.R. 1871 Before Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. (1959) 17, 18, 19
H.R. Rep. No. 357, 86th Cong., 1st Sess. (1959) 4, 27
H.R. Rep. No. 439, 88th Cong., 1st Sess. (1963) 44
H.R. Rep. No. 519, 89th Cong., 1st Sess. (1965) 13, 31, 32
H.R. Rep. No. 528, 89th Cong., 1st Sess. (1965) 45
H.R. Rep. No. 873, 87th Cong., 1st Sess. (1961) 43
H.R. Rep. No. 1329, 88th Cong., 2d Sess. (1964) 9, 45
H.R. Rep. No. 1561, 86th Cong., 2d Sess. (1960) 43
H.R. Rep. No. 1607, 87th Cong., 2d Sess. (1962) 44
105 Cong. Rec. 12711 (July 6, 1959) 21

lieu of a fixed dollar amount as provided in other pay systems.

Congress enacted prevailing-wage, or comparability, pay statutes, prior to and subsequent to the Teachers Pay Act without including specific provisions, in such acts, relating future salaries to funds that might be necessary to achieve comparability to prevailing wages or salaries. This is in conformity with rulings and decisions of the Comptroller General. For example, in *39 Comp. Gnl. 422* (December 1959), *Decision B-139880,* the following pertinent excerpts:

> ". . . section 210 of the General Government Matters Appropriation Act, 1958, approved June 5, 1957, 71 Stat. 55, 31 U.S.C. 665 . . :—
>
> 'Hereafter, any appropriation required to be apportioned pursuant to section 3679 of the Revised Statutes, as amended (31 U.S.C. 665) may be apportioned on a basis indicating a need for a supplemental or deficiency estimate of appropriation to the extent necessary to permit payment of such pay increases as may be granted to those employees (commonly known as wage-board employees) whose compensation is fixed and adjusted from time to time in accordance with prevailing rates (5 U.S.C. 1082(7)).' (p. 423).
>
> "The general rule is that expenditures are properly chargeable to the appropriation for the fiscal year in which liability therefor was incurred. There can be no doubt that when administrative action is taken to grant pay increases effective on a specified date, there is imposed legal liability upon the Government for payment of the additional compensation. Such action is sufficient to create an obligation against the appropriation current at the time the liability is incurred. The fact that the appropriation thereby obligated may be

insufficient to discharge the obligation is immaterial insofar as determining when the obligation arises and the appropriation properly chargeable therewith. See 17 Comp. Gen. 664; 18 id. 363; 31 id. 608; 38 id. 81.

"Applying the general rule here, it must be held that since the effective date to pay increases to wage board employees serves to create a liability of the Government for payment of the additional compensation, the appropriation chargeable therewith is the one currently available for payment of the wages for the period to which the increases apply." (pp. 424-425)

* * * * * * * * *

"Accordingly, obligations or expenditures of funds due to pay increases granted wage board employees in accordance with Public Law 85-872, which are in excess of the appropriation available and which are incurred prior to obtaining an apportionment request or supplemental or deficiency appropriation to discharge payment of the additional compensation may, to the extent necessary to permit payment thereof, be considered as obligations 'authorized by law' within the purview of the antideficiency statute and, therefore, not in violation thereof." (p. 426)

Salaries for all civilians employed by the Department of Defense are available out of, and funded by, the "Operations and Maintenance Fund in each annual Department of Defense Appropriation Act. (Answer of Defendant to Para. 11(a), Petitioners' Amended Complaint)[3]

---

[3] "11.(a) (Amended Complaint) That salaries for all civilians employed by the Department of Defense are available out of and funded by the 'Operations and Maintenance Fund' in each annual Department of Defense Appropriation Act".

"11 (a). (Defendant's Answer) Defendant admits the aliegations contained in paragraph 11(a) of the amended complaint."

Paragraph 11(e) of Petitioners' Amended Complaint alleges "That the Department of Defense never applied to Congress for supplemental allowances on the premise that it lacked funds to pay teachers' salaries" To which Defendant answered: ". . . denies the allegations except to admit that the Department of Defense never applied to Congress for supplemental allowances." (Appendix on Appeal, p. 62; pp. 73-74.)

No appropriation act, prior to the Teachers Pay Act of 1959, or subsequent thereto, refers to teachers' salaries, or allocates any one item of school expense; only an average overall cost *per pupil* is mentioned. For example, the following provision in the Act of October 17, 1963 (77 Stat. 264, § 506 (1963)) is typical of similar statements in all relevant appropriation acts:

> Sec. 506. Appropriations for the Department of Defense for the current fiscal year shall be available . . . for primary and secondary schooling for minor dependents of military and civilian personnel . . . in amounts not exceeding an average of $285 per student . . ."

Appropriation Committees were aware of the DOD's failure to pay teachers full Pay Act rates and admonished the Agency not to use the *per pupil* allowance as its excuse to penalize the teachers:

> In House Report No. 1607, 87th Congress, 2d Sess., accompanying the Department of Defense Appropriations Bill, 1963, that Appropriations Committee noted:
>
> "EDUCATION OF DEPENDENTS OVERSEAS
>
> "The Committee recommends that the limitation (Sec. 506), expressed per pupil, on the expenses of the dependents overseas education program be raised from its present level of $275 to $280. This amount is $5 less than the budget

proposal for a limitation of $285 . . . In taking this action, the Committee is not indicating its disapproval of a bona fide, justified increase in the pay of overseas teachers.

"The Committee wishes to point out that a number of factors led to the action recommended . . . although the Department of Defense issued basic directives on the overseas program in 1959, it has no effective mechanism for inspection or compliance. . . .

"Several of these matters were brought to light by the investigative staff of the Committee, and it is proposed that the research be continued. It is also suggested that the Department of Defense may wish to cooperate in the matter so that more meaningful ground rules be established, and the limitation hereafter be more realistic, *less punitive as to the teaching staff,* and capable of being more effectively administered. . . ." (Italics supplied)

And in the following year, the same House Appropriations Committee again criticized the practices of the DOD, as follows: H. Report No. 439, 88th Congress, 1st Session, Department of Defense Appropriation Bill, 1964, had this to say of record at pages 28-29:

"OVERSEAS DEPENDENTS EDUCATION PROGRAM

* * *

"The Committee on Appropriations ordered a thorough survey of the overseas education program. In its report, the Investigative Staff disclosed *numerous practices which clearly indicate that this program must receive immediate and vigorous attention* if it is to operate efficiently and economically. Some of the exceptions taken in the report are:

(1) Lack of uniformity among the services as to items being charged to the per-pupil limitation.

(2) *The per-pupil limitation as presently administered is neither meaningful nor effective in the budgeting, funding, or expending procedures under the program.*

(3) Major variances existed among the services in the:

(a) Budgeting, funding and accounting procedures.

(b) Determination of average membership.

(c) Charges for tuition-fee schools and correspondence courses.

(d) Operation of summer schools.

(e) Determination of tuition rates for attendance of non-DOD pupils at DOD schools.

(f) *Determination of per-pupil costs.*

(g) Utilization of tuition receipts, *and the effect on per-pupil limitation.*

"*The funding of this program on the basis of a per-pupil limitation has certain shortcomings.* However, much of the difficulty experienced in the administration of this program can be attributed to a *lack of uniform and adequate administration coupled with inadequate surveillance by the Office of the Secretary of Defense and the three services.*

"During the hearings this year, the Committee was informed of numerous actions that had been inaugurated by the Department of Defense to improve the operation of the overseas schools. The Committee will watch with interest the results obtained by these actions especially with regard to inflated headquarters staffs.

"If a satisfactory plan of administration cannot be developed under the present method of fund-

> ing this program. the Committee will consider alternative funding proposals presented by the Department." (Italics supplied.)

Finally the Post Office and Civil Service Committee which was responsible for the Teachers Pay Act of 1959, P.L. 86-91, lost patience with the DOD and interposed to remedy the situation, unequivocally rejecting the DOD's contention that it possessed discretion to downgrade teachers' salaries and treat teachers as second class creditors. In its Report amending the basic Pay Act the House Post Office and Civil Service Committee denounced the DOD's failure to carry out the original intent of Congress:

> "The Committee on Post Office and Civil Service is deeply concerned at the treatment that has been accorded the overseas school teachers—a concern shared, it is believed, by many other Members of Congress—particularly in view of the obvious failure to administer the salary provisions of Public Law 86-91 as they were intended and expected by the committee and the Congress to be administered. Without attempting to place the blame, and whether it be due to administrative unwillingness to shoulder the burden of obtaining necessary funds or disagreement with the policies of Public Law 86-91, it certainly is essential that the problem be resolved without further delay." H. Rep. No. 519, 89th Cong., 1st Sess., pp. 3-4 (1965).

Accordingly, the Committee reported H.R. 6845, which ultimately became Public Law 89-391. The purpose of this new Act was to

> "establish a positive, reasonable, and fully effective legislative policy with respect to rates of compensation which shall be paid to teachers in the overseas dependents school system of the Depart-

ment of Defense, under which policy the Department of Defense and the three military departments *shall and must pay* such teachers salary rates equal to the average range of salaries paid teachers having comparable levels of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. This policy, and the mandatory payments of such equal salary rates, *is consistent with, and will strengthen, the policy laid down by the Congress in the enactment of the Defense Department Overseas Teachers Pay and Personnel Practices Act (Public Law 86-91), which thus far has not been effectuated in accordance with congressional intent.*" *Id.* at p. 2 (1965) (emphasis added).

This Report continued:

"The Post Office and Civil Service Committee and the Congress understood that in enacting Public Law 86-91 they were providing a firm and reasonable formula for the payment of appropriate salaries to overseas teachers. That understanding has not proved out. H.R. 6845 provides a standard which, although variable in amount, is positive because the precise dollar amounts in question are readily ascertainable. In fact, the currently applicable dollar amounts are already of record. The bill then goes on to direct and require that the overseas teachers shall be paid salaries determined by the standard. *There is no room for the substitution of independent views or judgments by any Federal, civilian or military official.* The average of the range of rates of salaries paid teachers having positions of comparable levels of responsibility in urban school jurisdictions of 100,000 or more population within the United States will have to be computed, and all of the figures are matters of public record, each year, and the results of the computations will be applied directly to overseas teachers' salaries." *Id.* at p. 4 (emphasis added)

Public Law 89-391 was therefore enacted to amend Section 5(c) of the Act so as to provide that:

> "The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population." 80 Stat. 117, 29 U.S.C. § 2353 (c).

In the 1966 legislation Congress clearly intended only to accomplish the objective of the 1959 Act—which it felt had been undermined by DOD—and to insure that that which it had provided in the 1959 Act would henceforth be carried out without compromise or deviation.

The District Court accorded the text and purpose of the 1966 Amendments no weight, holding that "[t]he views of a subsequent Congress do not provide *any* basis for inferring the intent of an earlier one" (R. 465).

That holding is plainly wrong—and particularly in the context of this case. It has never been and is not now the law that subsequent legislative history provides *no* basis upon which to evaluate the intent of an earlier one. Indeed, only recently the Supreme Court has reminded us that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 380-381 (1969).

The only justification for DOD's assumption of discretion to NOT pay salary rates specified in the Pay

Act was the Agency's gratuitous "Comment" in its regulation which merely observes:

> "COMMENT 1: It is planned if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.
>
> (Appendix C, (e) p. 23a, Salary Determination Procedures, of August 31, 1960).

But as noted, *infra,* p. 17, " . . . the per pupil limitation represent(s) only a portion of the total cost of the program" (H. Report No. 1329, 88th Congr., 2nd Sess. p. 27 (1964)).

Petitioner teachers are hired on a school year basis; they are hired many months in advance of each school year, which is also many months in advance of passage of appropriation acts. Appropriation Committees were aware of the prevailing wage statute applying to these teachers, P.L. 86-91.

No appropriation act mentions or refers to teachers or to teachers' salaries, or to the salaries for other school personnel. Authorization of appropriations for the school program merely mentioned *a per capita figure for the average, overall cost of schooling one pupil* (Sec. 506, p. 10, *supra*); but such statistical average, embracing many items, could not be known until the conclusion of the school year because such average cost is computed on the number of pupils who have actually attended classes for the required number of days per year. This formula was adopted because it is difficult to predict in advance the actual number

of pupils who will attend in any one year by reason of the constant movement and rotation of military personnel and their dependents between the continental United States and overseas posts.

The so-called "per pupil limitation" or cost for schooling per pupil, was subject to the *further uncertainty that it did not embrace all items* of school expense, which Appropriation Committees was aware of.

> "Funds made available on the basis of the per pupil limitation represent only a portion of the total cost of the program."
>
> H. Report No. 1329, 88th Congr., 2nd Sess. p. 27 (1964).

The DOD, itself, has been unable to furnish the trial court, or Congress, with the actual average cost per pupil, or even submit an *estimate* of the average cost per pupil, for any of the school years in question, alleging that the records showing such costs are no longer available. As to which, see:

> INTERROGATORIES OF PLAINTIFF
> Filed, April 29, 1968
>
> "20. State the actual average cost per pupil for the education of dependents overseas for the school years, including those items of expense not charged to the PPL."

To which the defendant answered:

> "20. Records are not available to permit determination of the actual average cost per pupil for the education of dependents for the school years."

> INTERROGATORIES OF PLAINTIFFS
> Filed July 22, 1968
>
> "1. State the approximate or estimated average cost per pupil for the education of dependents overseas for the school years."

To which the defendant answered:

> "1. Records are not available to permit us to estimate or approximate the total actual average cost per pupil for the education of dependents for the school years in question. . . . ."
>
> (Appendix E, pp. 25a, 26a, from Appendix on Appeal pp. 90-91)

Thus the unprecedented situation whereby the DOD adopted the theory that Pay Act salaries would be honored provided the per pupil limitation were adequate (see the "Comment 1:" quoted supra, p. 16, yet the actual, or even the estimated approximate cost per pupil remains an unexplained mystery. And the judgment in this case is keyed to the defendant's contention that *if* the PPL *seemed insufficient to the Secretary of Defense* he automatically became authorized to NOT pay Act salaries!

C. Failure of Appropriations Cannot Extinguish the Government's Debt

It is well established that a debt or obligation of the United States created by contract or statute is not extinguished merely by the inadequacy of an appropriation. "In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due [citations omitted]". *Lovett* v. *United States,* 66 F. Supp. 142, 104 Ct. Cl. pp. 557, 582 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946). See also *Strong* v. *United States,* 60 Ct. Cl. 627 (1925) and *United States* v. *Vulte,* 233 U.S. 509 (1914).

The applicable principle of law was clearly stated by the Supreme Court in *United States* v. *Langston,* 118

U.S. 389 (1886). That case involved a suit for back pay by the United States Ambassador to Haiti, under a statute which provided that his annual salary would be $7,500. In a series of appropriations acts, Congress had appropriated only $5,000 for his salary, and as a consequence he had been paid only that amount. The Court held that the basic pay statute controlled, notwithstanding the inadequacy of the appropriation:

> "While the case is not free from difficulty, the court is of the opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law" (118 U.S. at 394).

It is, of course, immaterial that the statute involved in the present case, unlike the one in *Langston,* did not prescribe a specific rate of pay in terms of dollars, but rather provided a standard for the establishment of salary rates. A recent Court of Claims decision demonstrates that the *Langston* principle is equally applicable in such circumstances. *New York Airways, Inc.* v. *United States,* 369 F.2d 743 (Ct. Cl. 1966). That case arose under a statute providing that airlines carrying mail would receive subsidy payments in amounts to be determined by the CAB, in accordance with standards set forth in the statute. In 1965 the appropriations for the subsidy payments became exhausted, and the Government then discontinued making such payments. When several airlines brought suit, the Government

contended that its liability was limited to the amounts appropriated by Congress. The Court disagreed:

> "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute * * * The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims [citations omitted]." 369 F.2d at 748.

In *Ballou* v. *Kemp,* 92 F. 2nd 556, the U. S. Court of Appeals considered an argument strikingly similar to the case under consideration. In *Ballou* the Superintendent of Schools for the District of Columbia refused to admit a student whose father was employed officially in the District, on the grounds that the schools were overly crowded and Congress failed to appropriate funds sufficient to relieve the congestion. The applicable statute provided that

> "All pupils whose parents are employed officially in the District of Columbia shall be admitted and taught free of charge in the schools of said District."

The court ordered the Superintendent to admit the plaintiff.

The DOD acknowledges, in this case, that it never even applied to Congress for supplemental allowances or appropriations to meet all school expenses:

> "The Department of Defense did not submit a separate line item request for teachers' salaries in any of the school years 1959-1966. The Department of Defense did not at any time apply to Con-

> gress for supplemental appropriations (i.e., additional amounts to supplement the sum originally appropriated) for the purpose of paying teachers rates comparable to those paid in urban school districts in the United States . . . ."
>
> Appendix E, p. 27a, Stipulation of Facts, Item 22, p. 27a)

As noted above at (p. 9, this Petition) "obligations or expenditures of funds due to pay increases granted wage board employees . . . which are in excess of the appropriation available . . . may, to the extent necessary to permit payment thereof, be considered as obligations 'authorized by law' . . ." (39 Comp. Gnl. 422, 426)

D. The District Court Predicated Its Judgment Vitiating the Substantive Pay Act Upon the DOD's Comment in a DOD Authored Regulation

The District Court noted that "The Secretary issued regulations calling for an annual salary review with a comparison of compensation paid in school jurisdictions of one hundred thousand population and over—subject to the per pupil limitation." (Appendix A, p. 4a). "The allocation of the amount to be paid teachers and for other necessary expenses was left to the sound discretion of the Secretary of Defense . . . and this Court now so finds." (Appendix A, p. 5a).

Thus the clear statutory rates of the Pay Act were repealed by the Secretary's "Comment" in his regulation. As to which this Court said in *Manhattan General Equipment* v. *Commissioner,* 297 U.S. 129; 56 S. Ct. 397; 80 L. Ed. 528:

> "The power of an administrative officer or board to administer a federal statute and to prescribe

regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity." (and cases cited therein)

E. Prior Litigation

In *Mitchell* v. *McNamara,* 122 U.S. App. D.C. 224, 352 F.2d 700 (1965) brought to mandate the Secretary of Defense to issue appropriate salary schedules, the parties plaintiff and parties defendant were different, the relief prayed for was different, the Court dismissed solely on the ground of lack of jurisdiction on the part of the court and over the parties or the subject matter mandate.

In the Court of Claims, in *Crawford* v. *United States,* 179 Ct. Cl. 128; 376 F.2d 266 (1967), cert. den. 389 U.S. 1041 (1968), was not a class action. (a full copy of this decision is annexed at Appendix G, pp. 29a-55a). Other teachers expressly excluded from the case in the District Court, prayed for salaries "equal to" those in the District of Columbia, whereas in this case the plaintiffs' claim is different, their claim is for rates "in relation to" the rates specified in the statute. A very strong dissent was written by the Court of Claims in *Crawford* pointing out that appropriation problems cannot extinguish a statutory obligation; but the District Court rejected this principle saying that § 2352(c) of the Pay Act did not fix the annual salaries of the teachers, but that such salaries were governed by later appropriations.

REASONS FOR GRANTING THE WRIT

There are several special and important reasons why the Writ should be granted:

The entire thrust of the judgment is to give birth to the novel doctrine that administrators are empowered by fiat to segregate creditors of the Federal establishment into preferred and secondary creditors —extinguishing statutory obligations by the mere stroke of an administrator's pen.

In the interest of brevity your Petitioners have refrained from commenting, at this time, on the lower court's obvious misapprehension of several material factual matters which are not in dispute but have been stipulated. Petitioners have refrained from developing this aspect of the case, at this time, because, arguendo, even accepting such factual misapprehensions, the judgment is wrongly decided and is clearly repugnant to fundamental principles of law, equity and simple justice.

Not only have the 20,000 Petitioners—who represent a wide cross-section of dedicated educators recruited from the fifty states—been deprived of their property without due process, their morale has been unavoidably damaged, with resulting disallusionment on the part of their more than 180,000 impressionable students who represent the youth of our fifty states, many of whom openly question the sincerity of America's First Commandment: Equal Justice Under Law For All Persons.

This unique situation deserves the scrutiny and consideration of all Nine Justices of this Honorable Court.

Unless this judgment is corrected, henceforth all persons in the Federal establishment will be subject to being segregated into preferred and secondary creditors. In this case the Department of Defense established "Class One Creditors", so to speak, namely: Headquarters staff, principals, superintendents, clerks, bus drivers, janitors, *and all other persons employed in the activity who were not classroom teachers.* Classroom teachers were classified as "Second Class Creditors", so to speak, and as such not entitled to compensation fixed by Public Law 86-91, the specific Teachers Pay Act applying to classroom teachers. The Secretary of Defense decreed that classroom teachers, alone, would be paid whatever compensation he deemed adequate.

At the same time the Secretary did not attempt to discount contractual obligations for supplies, such as for books, ping pong balls, archery equipment, etc. Such creditors were paid in full.

The judgment is not only wrongly decided, it is further unique in that it bestows a license on administrators to *not* account for the appropriations entrusted to them. The principal premise on the part of the Secretary for NOT paying teachers their Pay Act salaries was: that if he paid statutory rates he would experience an insufficiency of appropriations. When Petitioners requested the records establishing actual costs, the Department of Defense replied:

> "Records are not available to permit determination of the actual average cost per pupil for the education of dependents overseas for the school years".

* * * * * * * * *

> ". . . (or) . . . to permit us to estimate or approximate the total actual average cost . . . for the school years in question. . . ." (Appendix E, pp. 25a, 26a)

The courts below attached no significance to this strange inability to account for appropriations spent, in spite of the fact that the sole defense is keyed to the alleged insufficiency of appropriations.

If the judgment is permitted to stand, in the future trustees of taxpayers' money will be immune from accounting to anyone, including the courts, thus doubly sanctioning the taking of property without due process.

As noted earlier in this Petition, the judgment does violence to the long line of decisions of this Court, as well as other courts, holding that insufficiency or appropriations, or even total failure of appropriations, cannot extinguish an authorized obligation.

Further, the judgment is clearly repugnant to the several Acts of Congress establishing the policy that all Federal employees' compensation shall be comparable to rates prevailing in private enterprise, not merely as a matter of equity and justice, but in order to obtain and retain competent persons in the Federal establishment. See: P.L. 86-568, 74 Stat. 298 (1960); P.L. 87-793, Sec. 502(b), 76 Stat. 841 (1962) the Federal Salary Reform Act, "Federal salary rates shall be comparable with private enterprise salary rates for the same levels of work . . . and henceforth adjusted in accordance with the above principles." (Sec. 502).

The decision is clearly repugnant to basic Due Process requirements. In *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292; 57 S. Ct. 724; 81 L. Ed. 1098 (1937), the Public Utilities Commission revised the telephone company's rates downward based

upon a revaluation of the Company's property, in part upon information secretly collected by the Commission but never disclosed. Similarly, in this case, the Secretary of Defense revised teachers' salaries downward, substantially below rates fixed by statute, on the premise that when he merely anticipated a deficiency of funds to pay all obligations in full, he became clothed with power to do so. When the Petitioners requested the Secretary's records pertaining to the actual costs to operate the schools, the Secretary replied that such records were not available, whether to show actual costs, estimated costs or even approximate costs (Appendix E, pp. 25a-26a). Yet the District Court, without even making a finding of fact concerning availability or nonavailability of funds, validated the Secretary's novel contention of discretion and power to downgrade teachers' statutory salaries.

It is respectfully submitted that this constitutes a clear denial of due process under Constitution Amendment 14 as Mr. Justice Cardozo noted in the case of *Ohio Bell,* supra:

> ". . . the Commission cut down values . . . upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain them and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sum mounting into millions, the Commission reporting its conclusions but not the underlying proofs. The putative debtor[4] does not know the proofs to-day. This is not the fair hearing essential to due process." (301 U.S. at p. 300)
>
> * * * * * * * * *

[4] In this case the underpaid creditor teachers.

". . . From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this; that even now we do not know the particular or evidential facts of which the Commission[5] took judicial notice and on which it rested its conclusion. Not only are the facts unknown, there is no way to find them out.[6] When . . . government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. . . . This will never do if hearings and appeals are to be made more than empty forms." (p. 303)

"Reversed and remanded."

CONCLUSION

For the foregoing reasons the Writ should be granted.

Respectfully submitted,

EARL C. BERGER,
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022

---

[5] In this case the District Court and the Court of Appeals.

[6] The Secretary of Defense advised the Court that the records establishing school costs are not available.

APPENDIX A

Decision of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 4106

HOMEZELL CHAMBERS, ET AL., *Plaintiffs*

v.

THE UNITED STATES, *Defendant*

ORDER AND MEMORANDUM OPINION

This suit was brought on behalf of those overseas teachers whose rights were not adjudged in Crawford v. United States, 179 CCl 128, 376 F.2d 266 (1967), cert. den. 389 U.S. 1041 (1968), seeking here the back pay denied their colleagues in the Crawford case.

The teachers make substantially the same arguments here that their colleagues made in the Court of Claims —They claim their basic compensation as fixed by the Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213—Public Law 86-91—should equal that received by teachers in the United States school jurisdictions of over one hundred thousand population—that they were paid less—therefore the Government should be required to now pay them the difference between what they received and what they were entitled to receive.

The Secretary says the Act nowhere requires such mandatory result but, instead, left the precise salary to the Department of Defense.

The material facts are not in dispute—They were stipulated and need not here be recited in full—Suffice it to state, prior to 1959 overseas teachers working for the Department of Defense were governed by the Classification Act of 1949, 5 U.S.C. § 1071, and the Annual and Sick

Leave Act of 1951, 5 U.S.C. § 2061. Then the teachers could be paid only the proportionate amount of the specified amount of salary for their grade. They could not be paid during the summer vacation or during the usual Christmas, Easter and Thanksgiving recesses unless they had annual leave available; and if they were placed in a leave-without-pay status their overseas differentials and allowances were discontinued.

To overcome these problems, the Overseas Teachers Pay and Personnel Practices Act was proposed. It became law on July 17, 1959. The Act exempted overseas teachers from coverage under the Classification and Annual and Sick Leave Acts. It did not purport to establish the overseas dependents' school system other than on an annual basis, as was then the practice. It delegated to the Secretary of Defense authority to issue regulations necessary to carry out the purposes of the Act.

Both parties filed motions for summary judgment.

Upon consideration of the briefs and authorities cited therein and the oral argument of counsel, the Court is of the opinion that the defendant's motion for summary judgment ought to be granted and the plaintiffs' motion for summary judgment ought to be denied, and

It Is So Ordered.

The pertinent portion of the statutes involved provides:

5 U.S.C. § 2352—

"(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—

* * * * *

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States."

5 U.S.C. § 2353—

"(c) The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

The Overseas Dependents' School System is not a continuing program. It is provided for on a yearly basis—Expenditures of the annual appropriated funds are limited to x-dollars per student, loosely referred to as the per pupil limitation.

The Secretary has always fixed the overseas teachers' salaries together with the other expenses incident to the operation of the overseas school system so as to keep the overall costs within the per pupil limitation as set forth in the annual Appropriations Act. This fact was made known to the Congress when the Secretary submitted his annual request for funds, yet only for the fiscal year 1960-1961 did the Congress appropriate sufficient moneys to permit fixing teachers' salaries at levels equal to those in the United States school districts with over one hundred thousand population after all other items chargeable to the per pupil limitation were taken care of.

Upon substantially the same record as here made, the United States Court of Claims held that overseas teachers were not entitled to recover their claimed back pay (Crawford v. United States, 376 F.2d 266 (1967).) Judge Skelton, speaking for the majority, said that overseas teachers' salaries were keyed to the per pupil limitation contained in the Appropriations Act and were to be fixed within such limitation in the discretion of the Secretary of Defense.

As suggested by the teachers, this Court has read and reread both the majority and dissenting opinions in Crawford, as well as the briefs and citations of counsel in the present case, and elects to follow the majority opinion.

Judge Nichols, speaking for the minority, did not go along with the teachers and read "in relation to," as used in the statute (5 U.S.C. § 2353(c)) to mean "equal to"— He construed the phrase as requiring the Secretary to ascertain stateside salaries and, in light of his finding, fix compensation that was at least comparable.

With all due respect to the minority opinion, that is but another way of saying § 2353(c) of the statute fixed the annual salary of overseas teachers regardless of the per pupil limitation set by the annual congressional appropriation. The minority in Crawford seems to hold the Secretary fixed the teachers' salary, then cut it.

The record here made is to the contrary. The Secretary issued regulations calling for an annual salary review with a comparison of compensation paid in school jurisdictions of one hundred thousand population and over—subject to the per pupil limitation.

The educational associations were so advised. They in turn told the Appropriations Committee the per pupil limitation limited salaries. It limits the amount of money which may be spent for textbooks, library books and tuition, but since most of the money appropriated goes into salaries, it is salaries which are in turn most limited.

The salaries listed by the Secretary for budgeting purposes were tentative at best—subject to being adjusted, if necessary, to keep within the per pupil limitation as fixed by the Congress. The Secretary has so interpreted the statutes in question since their adoption. The interested educational associations, to say the least, acquiesced.

The teachers suggest that the 1966 amendment requiring that the Secretary fix basic teacher salaries at rates

equal to the average of the range of rates paid teachers of a comparable level in urban jurisdictions in the United States with populations in excess of one hundred thousand in indicative of what the Secretary should have done in administering Public Law 86-91. Such is not the law. The views of a subsequent Congress do not provide any basis for inferring the intent of an earlier one. See United States v. Price, 361 U.S. 304 (1960), and United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

The teachers' contention that the Secretary could have fixed their salaries equal to those paid comparable teachers in the District of Columbia and still stayed within the per pupil limitation as fixed by the Congress by decreasing the amount spent for desks, books, supplies, and so forth, or by cutting the administration costs or by increasing the class sizes—may or may not be true. That is not the question here to be determined. The Congress fixed the total amount that could be spent for the operation of the overseas dependents' school system each year. The allocation of the amount to be paid teachers and for the other necessary expenses was left to the sound discretion of the Secretary of Defense. The Court of Claims has so found, and this Court now so finds.

The fact that tuition fees paid in the Canal Zone are higher than the per pupil limitation does not alter the decision here made. These tuition fees had to be paid by the Government because the applicable law (68 Stat. 335) required full reimbursement to the Canal Zone government for education provided to overseas dependents. The per pupil limitation is only an average amount that can be spent for each pupil—not a limitation applicable to every area or school.

The Clerk will send copies of this order and memorandum opinion to all counsel of record.

/s/ OREN R. LEWIS
United States District Judge

November 21, 1969

APPENDIX B

Decision of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,392

HOMEZELL CHAMBERS, JOAN KILLE CONNOCK, DORIS ANDERSON GRANT, ETTA LOUISE REXRODE, JOHN D. JELINEK, HELEN MARGARET SWEDZINSKI, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Before Haynsworth, Chief Judge, Bryan, Circuit Judge, and Martin, District Judge.

(Argued November 11, 1970. Decided January 5, 1971.)

Isaac N. Groner (Alan Y. Cole and William Kanter, and Cole and Grofner; Earl C. Berger, and Lorber, Vogel & Berger on brief) for Appellants, and David J. Anderson, Attorney, Department of Justice, (William D. Ruckelshaus, Assistant Attorney General, and Morton Hollander and Harland F. Leathers, Attorneys, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Appellee:

PER CURIAM:

Affirmed on the opinion of the District Court. Chambers vs. United States, E.D., Va., 306 F.Supp. 317.

Affirmed.

APPENDIX C

Statutes and Regulations Involved

(a) Pertinent Portions of PL 86-91

The Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959), provided in pertinent part as follows:

> "Sec. 4. (a) Not later than the ninetieth day following the date of enactment of this Act, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern
>
> * * *
>
> "(2) the fixing of rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;
>
> * * *
>
> "Sec. 5. (a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this Act, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act.
>
> * * *
>
> "(c) The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

* * *

(b) All of PL 86-91

PUBLIC LAW 86-91
86TH CONGRESS, S. 96
JULY 17, 1959

AN ACT

73 Stat. 213.

To govern the salaries and personnel practices applicable to teachers, certain school officers, and other employees of the dependents schools of the Department of Defense in overseas areas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Defense Department Overseas Teachers Pay and Personnel Practices Act".

DEFINITIONS

SEC. 2. For the purposes of this Act, the term—

(1) "teaching position" means those duties and responsibilities which—

(A) are performed on a school-year basis principally in a school operated by the Department of Defense in an overseas area for dependents of members of the Armed Forces and dependents of civilian employees of the Department of Defense, and

(B) involve—

(i) classroom or other instruction or the supervision or direction of classroom or other instruction; or

(ii) any activity (other than teaching) which requires academic credits in educational theory and

practice equal to the academic credits in educational theory and practice required for a bachelor's degree in education from an accredited institution of higher eduction; or

(iii) any activity in or related to the field of education notwithstanding that academic credits in educational theory and practice are not a formal requirement for the conduct of such activity.

(2) "teacher" means an individual—

(A) who is a citizen of the United States,

(B) who is a civilian, and

(C) whose services are required on a school-year basis in a teaching position.

(3) "overseas area" means any area situated outside the United States.

(4) "United States", when used in a geographical sense, means the several States of the United States of America, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, the Canal Zone, and the possessions of the United States (excluding the Trust Territory of the Pacific Islands and Midway Islands).

EXEMPTION OF TEACHERS AND TEACHING POSITIONS FROM CLASSIFICATION ACT OF 1949

SEC. 3. Section 202 of the Classification Act of 1949, as amended (5 U.S.C. 1082), is amended by adding at the end thereof the following paragraph:

"(32) 'teachers' and 'teaching positions' as defined in the Defense Department Overseas Teachers Pay and Personnel Practices Act."

REGULATIONS OF SECRETARY OF DEFENSE

SEC. 4. (a) Not later than the ninetieth day following the date of enactment of this Act, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes this Act. Such regulations shall govern—

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this Act.

(b) The regulations prescribed and issued by the Secretary of Defense under subsection (a) of this section shall become effective on such date as the Secretary of Defense shall prescribe but not later than the ninetieth day following the date of issuance of such regulations.

ADMINISTRATION

SEC. 5. (a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this

Act, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act.

(b) Subject to section 203 of the Classification Act of 1949 (5 U.S.C. 1083), the secretary of each military department—

(1) shall determine the applicability of paragraph (32) of section 202 of such Act, as added by section 3 of this Act, to positions and individuals in his military department, and

(2) shall establish the appropriate annual salary rate in accordance with this Act for each such position and individual to which such paragraph (32) is determined to be applicable.

(c) The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

(d) The Secretary of each military department may prescribe and issue such regulations as he deems appropriate to carry out his functions under this Act.

LEAVE

SEC. 6. (a) Subject to the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act, each teacher (other than an individual employed as a substitute teacher) shall be entitled to cumulative leave, with pay, which shall accrue at the rate of one day for

each calendar month, or part thereof, of a school year, except that—

(1) if the school year includes more than eight months, any such teacher who shall have served for the entire school year shall be entitled to ten days of cumulative leave with pay, and

(2) not more than seventy-five days of leave may accumulate to the credit of a teacher at any one time under this subsection.

(b) Saturdays, Sundays, regularly scheduled holidays, and other administratively authorized nonwork days shall not be considered to be days of leave for the purposes of subsection (a) of this section.

(c) Subject to the regulations prescribed and issued by the Secretary of Defense, leave earned by any teacher under subsection (a) of this section may be used by such teacher—

(1) for maternity purposes,

(2) in the event of the illness of such teacher,

(3) in the event of illness, contagious disease, or death in the immediate family of such teacher, and

(4) in the event of any personal emergency.

If appropriate advance notice is given of the intended absence of a teacher, not to exceed three days of such leave may be granted for any purpose in each school year to such teacher.

(d) Any individual—

(1) who is holding a position which is determined to be a teaching position, or

(2) who is an employee of the Federal Government or the municipal government of the District of Colum-

bia who is transferred, promoted, or reappointed, without break in service, from a position under a different leave system to a teaching position,

shall be credited, for the purposes of the leave system provided by this section, with the annual and sick leave to his credit immediately prior to the effective date of such determination, transfer, promotion, or reappointment. Sick leave so credited shall be included in the leave provided for in subsection (a) of this section. Annual leave so credited shall not be included in the leave provided for in such subsection but shall be used under regulations which shall be prescribed by the Secretary of the military department concerned.

(e) In any case in which the amount of sick leave, which is to the credit of any individual under a different leave system immediately prior to the date on which he becomes subject as a teacher to the leave system provided by this section and which is included in the leave provided for in subsection (a) of this section, is in excess of the maximum amount of accumulated leave allowable under subparagraph (2) of such subsection, such excess shall remain to the credit of such teacher until used, but the use during any leave year of an amount in excess of the aggregate amount which shall have accrued during such year shall reduce automatically the maximum allowable amount of accumulated leave at the beginning of the next leave year until such amount no longer exceeds the maximum amount allowable under subparagraph (2) of subsection (a) of this section.

(f) Any annual leave remaining, upon his separation from the service, to the credit of an individual within the purview of this section shall be liquidated in accordance with the Act of December 21, 1944 (5 U.S.C. 61b and the following), except that leave earned or included under subsection (a) of this section shall not be liquidated.

(g) In the case of any teacher who is transferred, promoted, or reappointed, without break in service, to a position under a different leave system, the annual leave, and any other leave earned or credited under this section, which is to his credit immediately prior to such transfer, promotion, or reappointment, shall be transferred to his credit in the employing agency on an adjusted basis in accordance with regulations which shall be prescribed by the United States Civil Service Commission.

QUARTERS, QUARTERS ALLOWANCES, AND STORAGE

SEC. 7. (a) Under regulations which shall be prescribed by or under authority of the President, each teacher (other than a teacher employed in a substitute capacity) shall be entitled, in addition to basic compensation, to quarters, quarters allowance, and storage as provided by this section.

(b) Each teacher (other than a teacher employed in a substitute capacity) shall be entitled, for each school year for which he performs services as a teacher, to quarters or a quarters allowance equal to those authorized by the Act of June 26, 1930 (5 U.S.C. 118a).

(c) Each teacher (other than a teacher employed in a substitute capacity) who is performing services as a teacher at the close of a school year and agrees in writing to serve as a teacher for the next school year may be authorized, for the recess period immediately preceding such next school year—

(1) quarters or a quarters allowance equal to those authorized by the Act of June 26, 1930 (5 U.S.C. 118a), or

(2) in lieu of such quarters or quarters allowance, storage (including packing, drayage, unpacking, and transportation to and from storage) of his household effects and personal possessions.

(d) If a teacher does not report for service at the beginning of the next school year, he shall be obligated to the United States in an amount equal to any quarters allowance which he may have received under subsection (c) of this section or in an amount equal to the reasonable value of any quarters or storage which he may have received under such subsection, or both, as the case may be.

(e) Quarters, quarters allowance, and storage provided under this section shall be in lieu of any quarters, quarters allowance, and storage to which he otherwise might be entitled by reason of employment in another position during any recess period between two school years.

COST-OF-LIVING ALLOWANCES AND POST DIFFERENTIAL

SEC. 8. (a) Under regulations which shall be prescribed by or under authority of the President, each teacher (other than a teacher employed in a substitute capacity) shall be entitled, in addition to basic compensation, to—

(1) cost-of-living allowances equal to those authorized by section 901(2) of the Foreign Service Act of 1946 (22 U.S.C. 1131(2)), and

(2) additional compensation equal to that authorized under section 207 of the Independent Offices Appropriation Act, 1949 (5 U.S.C. 118h).

(b) The cost-of-living allowances and additional compensation provided under subsection (a) of this section for any teacher shall be based on the teaching position in which he rendered services on a school-year basis, except that, if such teacher is employed in another position during any recess period between two school years, such allowances and compensation for such recess period shall be based on the position in which he is employed during such recess period.

DETERMINATION OF PER ANNUM SALARY RATES OF TEACHING POSITIONS FOR PURPOSES OF CLASSIFICATION ACT OF 1949

SEC. 9. For the purposes of the application of section 802(a) of the Classification Act of 1949 (5 U.S.C. 1132(a)) to any individual holding a teaching position who comes within the purview of any provision of such section 802(a), the rates of pay established for such position shall be deemed to have been increased by 20 per centum to determine the per annum salary rate of such position.

APPLICABILITY OF CERTAIN EXISTING LAW

SEC. 10. (a) The Annual and Sick Leave Act of 1951, as amended (5 U.S.C. 2061 and the following), and the Federal Employees Pay Act of 1945, as amended (5 U.S.C. 901 and the following), shall not apply to teachers and teaching positions.

(b) In the case of any teacher who—

(1) is performing services as a teacher at the close of a school year,

(2) agrees in writing to serve as a teacher for the next school year, and

(3) is employed in another position in the recess period immediately preceding such next school year, or, during such recess period, receives quarters, allowances, or additional compensation referred to in sections 7 and 8 of this Act, or both, as the case may be,

section 2 of the Act of July 31, 1894 (5 U.S.C. 62), relative to the holding of more than one office, section 6 of the Act of May 10, 1916 (5 U.S.C. 58 and 59), relative to double salaries, and any other law relating to the receipt of more than one salary or the holding of more than one office shall not apply to such teacher by reason of any such employment during a recess period or any such receipt of quarters,

allowances, or additional compensation, or both, as the case may be.

(c) Notwithstanding any provision of law, employment of a teacher in the recess period between two school years in a position other than the teaching position in which he rendered service in the school year immediately preceding such recess period shall not be subject to the Federal Employees' Group Life Insurance Act of 1954 (5 U.S.C. 2091-2103) or to the Civil Service Retirement Act (5 U.S.C. 2251-2267).

SAVINGS PROVISION

SEC. 11. The enactment of this Act shall not affect—

(1) any teaching position existing immediately prior to the effective date of the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act,

(2) the compensation attached to such teaching position, or

(3) any incumbent thereof, his appointment thereto, or his right to receive the compensation attached thereto,

until appropriate action is taken under section 5 of this Act.

EFFECTIVE DATES

SEC. 12. (a) This section and sections 1, 2, 4, and 11 shall become effective on the date of enactment of this Act.

(b) Sections 3, 5, 6, 7, 8, 9, and 10 shall become effective on the effective date of the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act.

Approved July 17, 1959.

(c) Pertinent Portions of Appropriation Acts

The Department of Defense Appropriation Acts for the fiscal years 1953 through 1966 each contained a section authorizing the expenditure of funds for the operation of schools for the education of dependents of military and civilian Government personnel stationed overseas. The applicable Appropriations Act for the fiscal year 1953, § 616, 66 Stat. 533, provides in pertinent part as follows:

> "Appropriations for the Air Force and the Army for the current fiscal year shall be available for expenses in connection with * * * primary and secondary schooling for dependents of military and civilian personnel of the Department of Defense residing on military installations or stationed in foreign countries in amounts not exceeding an average of $225 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents."

The equivalent provisions in the subsequent Appropriation Acts are substantially identical, except for the amount of the average expenditures per student, which varied as follows:

Fiscal year	*Appropriation Act citation*	*Per pupil limitation*
1953.....	66 Stat. 533, § 616 (1952)	$225
1954.....	67 Stat. 351, § 614 (1953)	225
1955.....	68 Stat. 351, § 709 (1954)	235
1956.....	69 Stat. 315, § 609 (1955)	240
1957.....	70 Stat. 468, § 607 (1956)	245
1958.....	71 Stat. 323-324, § 607 (1957) ..	245
1959.....	72 Stat. 724, 867, § 606 (1958) ..	245-265
1960.....	73 Stat. 378-379, § 606 (1959) ..	265
1961.....	74 Stat. 350, § 506 (1960)	275
1962.....	75 Stat. 375-376, § 606 (1961) ..	275
1963.....	76 Stat. 328, § 506 (1962)	280
1964.....	77 Stat. 264, § 506 (1963)	285
1965.....	78 Stat. 475, § 506 (1964)	285
1966.....	79 Stat. 873-874, § 606 (1965) ..	455

(d) Pertinent Portions of Directive of Oct. 15, 1959

The Department of Defense Directive No. 1400.13, issued on October 15, 1959, provided in pertinent part as follows:

"F. *Compensation of Teaching Positions*

"1. *Basis*

"Rates of basic compensation for teaching positions will be fixed by the Secretaries of the military departments in relation to rates of basic compensation for similar positions in the continental United States, exclusive of Alaska and Hawaii, but no such rate shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the Municipal government of the District of Columbia.

"2. *Schedules*

"A single, coordinated, uniform compensation schedule will be jointly developed and adopted, and from time to time adjusted, as appropriate, by the three military departments, which will:

"(a) List the various classes and levels of teaching positions;

"(b) For each level, establish and prescribe on a school year basis the basic compensation step rates. At each level the schedule will also provide, in each step rate, for an appropriate additional increment for those teachers who possess a Master's degree and may provide a further increment for those who have completed a higher level of acadamic preparation."

There were various amendments to this Directive subsequent to October 15, 1959 but the pertinent provisions quoted above remained unchanged.

(e) Salary Determination Proceedings (Regulation of Aug. 31, 1960)

On August 31, 1960, the Department of Defense promulgated "SALARY DETERMINATION PROCEDURES—OVERSEAS DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1" which provides as follows:

"SALARY DETERMINATION PROCEDURES

"OVERSEAS DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1*

"1. *The compensation schedule will be reviewed annually.*

"COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

"2. *Review of the compensation schedule will be based on surveys of teaching position salaries conducted by the military departments, including the use of such authoritative salary data as may be available.*

"COMMENT: The military departments will conduct surveys of teacher salaries, extra curricular pay benefits and certain school administrative type positions

(* These procedures relate to teaching positions as defined in DOD Instruction 1400.13).

as are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid classroom teachers and school administrators in the United States. These publications are factual and can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

"3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustments in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*

"COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

"NOTE: By Bureau of the Budget regulations the Department of Defense is not permitted to budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages and salaries actually being paid can be considered.

"4. *The compensation schedule will be established and adjusted "in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed*

shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.''

"COMMENT 1: The above term will be applied as follows:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step (step (a)) of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

"COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

"COMMENT 3: A point may be reached where consideration will have to be given to a limitation on adjustments where such adjustments would result in these employees paid from the compensation schedule receiving a higher salary than their Classification Act supervisors.

"5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*

"COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

"COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a salary higher than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figure and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during these years when adjustments are not being proposed."

APPENDIX D

The following Table appears in H. Rep. No. 519, 89th Cong., 1st Sess. (1964), p. 11:

TABLE I.—*Trends in salary schedule averages, U.S. urban school districts, 100,000 and over in population, and overseas dependents schools, recent years*

Year	Number of districts (B.A. and M.A. classes)	B.A. salary class, mean amounts scheduled			Difference between M.A. (col. 7) and B.A. (col. 3)	M.A. salary class, mean amounts scheduled			6 years; master's plus 30 hours, mean amounts scheduled[1]		
		Beginning salary	Annual increments, number and size[2]	Maximum salary		Beginning salary	Annual increments, number and size[2]	Maximum salary	Beginning salary	Annual increments, number and size[2]	Maximum salary
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
1959-60	168	$4,070	12 at $187	$6,269	$317	$4,387	13 at $190[3]	$6,797	$4,887	13 at $213[3]	$7,661
1960-61	160	4,294	12 at $192	6,591	295	4,589	13 at $196[3]	7,135	5,064	13 at $225[3]	7,986
1961-62	167	4,454	12 at $199	6,790	313	4,767	13 at $202	7,387	5,243	13 at $229	8,221
1962-63	177	4,549	12 at $196	6,905	354	4,903	13 at $205	7,568	5,453	13 at $233	8,480
1963-64	178	4,693	12 at $201	7,101	371	5,064	13 at $213	7,829	5,661	13 at $238	8,756
1964-65	180	4,850	12 at $210	7,366	375	5,225	13 at $225	8,146	5,822	13 at $255	9,136
Department of Defense schedule: 1960-61, 1961-62, and 1962-63	—	4,065	10 at $185	5,915	200	4,265	10 at $185	6,115	4,365	10 at $185	6,215
1963-64 and 1964-65	—	4,165	10 at $185	6,015	200	4,365	10 at $185	6,215	4,465	10 at $185	6,315

[1] Fewer schedules recognize the 6th year than recognize the B.A. and M.A.; in 1964-65 there were 119 such districts, or 66 percent of the schedules analyzed. In these 119 schedules, the figures shown in cols. 3-9 were as follows: Col. 3, $5,096; col. 4, 12 at $214; col. 5, $7,660; col. 6, $351; col. 7, $5,447; col. 8, 13 at $239; and col. 9, $8,554.

[2] Because of rounding in computations, the final increment may be slightly different from the amount shown, in order to arrive at the mean maximum.

[3] Partly estimated.

APPENDIX E

Portions of Appendix on Appeal to the U. S. Court of Appeals for the Fourth Circuit

[Caption Omitted]

Interrogatories of Plaintiff

[Filed, April 29, 1968]

* * * * *

20. State the actual average cost per pupil for the education of dependents overseas for the school years, including those items of expense not charged to the PPL.

* * * * *

[Caption Omitted]

Defendant's Answers to the Plaintiffs' Interrogatories

[Filed June 7, 1968]

* * * * *

20. Records are not available to permit determination of the actual average cost per pupil for the education of dependents overseas for the school years.

[Caption Omitted]

Interrogatories of Plaintiffs

[Filed July 22, 1968]

* * * * *

1. State the approximate or estimated average cost per pupil for the education of dependents overseas for the school years.

* * * * *

[Caption Omitted]

Defendant's Answers to the Plaintiffs' Interrogatories

[Filed August 29, 1968]

1. Records are not available to permit us to estimate or approximate the total actual average cost per pupil for the education of dependents overseas for the school years in question (see defendant's answer to Plaintiffs' Interrogatory, Number 20, dated April 18, 1968).

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 4106

HOMEZELL CHAMBERS, ET AL., *Plaintiffs*

v.

THE UNITED STATES, *Defendant*

Excerpts from Stipulation of Facts

* * * * * * * * * *

20. In various years, the salary rates of teachers in overseas schools (shown on Exhibit 9) were lower than the average salary rates of teachers in urban school jurisdictions in the United Sstates with a population of 100,000 or more (shown on Exhibit 8). In each of the years involved, the Department of Defense determined that the total funds available under the per pupil limitation were not suffiicent to permit payment of salaries to its overseas teachers at the rates shown on Exhibit 8 and at the same time, to permit the payment in full of all other expenses (including the salaries of non-teaching personnel employed in the overseas schools) chargeable to the per pupil limitation in accordance with the applicable DOD instruction.

* * * * * * * * * *

22. The Department of Defense did not submit a separate line-item request for teachers' salaries in any of the school years 1959-1966. The Department of Defense did not at any time apply to Congress for supplemental appropriations (i.e., additional amounts to supplement the sum orignally appropriated) for the purpose of paying overseas teachers rates comparable to those paid in urban school districts in the United States with a population of 100,000 or more.

* * * * * * * * * *

APPENDIX F

[Caption Omitted]

[Filed January 16, 1970]

Notice of Appeal

Notice is hereby given that Homezell Chambers, Joan Kille Connock, Doris Anderson Grant, Etta Louise Rexrode, John D. Jelinek and Helen Margaret Swedzinski hereby appeal in their individual capacities and as representatives of the class herein to the United States Court of Appeals for the Fourth Circuit from the Judgment (Order and Memorandum Opinion) entered in this action on November 21, 1969, granting defendant's motion for summary judgment, and denying plaintiffs' motion for summary judgment.

/s/ Allan L. Kamerow
Allan L. Kamerow
3405 Sterling Avenue
Alexandria, Virginia
KI 8-5094
Attorney for Plaintiffs

Dated: January 16, 1970

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 17, 1967)

(376 F. 2d 266, 179 Ct. Cl. 128)

No. 83-65

JOSEPH B. CRAWFORD, ET AL. v. THE UNITED STATES

No. 93-65

ROCCO A. TRECOSTA v. THE UNITED STATES

No. 267-65

GAIL M. AANENSON, ET AL. v. THE UNITED STATES

No. 449-65

HARRY W. AHO, ET AL. v. THE UNITED STATES

No. 159-66

HELEN PHYLLIS ABRAHAMSEN, ET AL. v. THE UNITED STATES

No. 212-66

ESTHER KATRINA BARNES, ET AL. v. THE UNITED STATES

No. 407-66

EDNA T. ACKAL, ET AL. v. THE UNITED STATES *

Rocco A. Trecosta, pro se, in No. 93-65.

Earl C. Berger, attorney of record for plaintiffs in cases numbered 83-65, 267-65, 449-65, 159-66, 212-66, and 407-66. *Lorber, Vogel & Berger,* of counsel.

James F. Merow, with whom was *Assistant Attorney General Barefoot Sanders,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

---

* By order of the court of December 12, 1966, No. 407-66, *Edna T. Ackal, et al.,* v. *The United States,* was consolidated with Nos. 83-65, 93-65, 267-65, 449-65, 159-66, and 212-66.

ON PLAINTIFFS' MOTIONS AND DEFENDANT'S CROSS MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge,* delivered the opinion of the court:

This is a suit brought by 2,975 plaintiffs for backpay, alleged to be due them as teachers in overseas dependents schools operated by the Department of Defense for the education of minor dependents of overseas personnel of such Department during the years 1959 through 1966, under the provisions of the Overseas Teachers Pay and Personnel Practices Act, 5 U.S.C. §§ 2351-58 (1964), (hereinafter referred to as the Act or Public Law 86-91).

It is estimated by plaintiffs that this decision will affect some 20,000 overseas teachers whose claims amount to many millions of dollars.

For the purposes of this decision, the above-entitled seven cases have been consolidated inasmuch as the same basic issues are involved in all of them. The plaintiffs Joseph B. Crawford and Nell A. Walthers, No. 83-65, and Rocco A. Trecosta, No. 93-65, have moved for summary judgment and the defendant has filed a cross motion for summary judgment in all of the cases and they will be disposed of on the basis of such motions.

Prior to the years involved in these cases, the Congress did not enact any comprehensive laws with respect to the overseas school program for minor dependents of government personnel. The authority for operating such schools was contained in various appropriation bills for the Department of Defense and its various agencies. The bills authorized funds to be expended for these purposes when the Secretary of the Department concerned found that schools, if any, available in any given locality were unable to provide adequately for the education of such dependents.[1] Also, in each of these appropriation bills, as well as those enacted during the years involved here, Congress

[1] For example, see the Act of July 10, 1952, 66 Stat. 533, § 616 (1952).

placed an express limitation ceiling on the amount of the funds appropriated which could be used for the education of such dependents. This limitation was provided in the form of specific average amounts per pupil (hereinafter referred to as the "per pupil limitation"). For example, the following provision in the Act of October 17, 1963, was typical of similar statements in all of the relevant appropriation acts:

> Sec. 506. Appropriations for the Department of Defense for the current fiscal year shall be available * * * for primary and secondary schooling for minor dependants of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, * * * *in amounts not exceeding an average of $285 per student,* when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents * * *. [77 Stat. 264, § 506 (1963).][2] [Emphasis supplied.]

---

[2] The various appropriations acts for 1953 to 1966, inclusive, showing the per pupil limitation for the overseas schools are as follows:

Fiscal year	*Appropriation Act citation*	*Per pupil limitation*
1953.....	66 Stat. 533 § 616 (1952	$225
1954.....	67 Stat. 351 § 614 (1953)	225
1955.....	68 Stat. 351 § 709 (1954)	235
1956.....	69 Stat. 315 § 609 (1955)	240
1957.....	70 Stat. 468 § 607 (1956)	245
1958.....	71 Stat. 323-24 § 607 (1957)	245
1959.....	72 Stat. 724, 867 § 606 (1958)	245-265
1960.....	73 Stat. 378-79 § 606 (1959)	265
1961.....	74 Stat. 350 § 506 (1960)	275
1962.....	75 Stat. 375-76 § 606 (1961)	275
1963.....	76 Stat. 328 § 506 (1962)	280
1964.....	77 Stat. 264 § 506 (1963)	285
1965.....	78 Stat. 475 § 506 (1964)	285
1966.....	79 Stat. 873-74 § 606 (1965)	455

The Congress was informed at all times relevant to this case of the costs charged to appropriate funds and to the per pupil limitation in the overseas schools. Generally, such chargeable costs included salaries of superintendents and other professional and non-professional personnel engaged in the general administration of the schools, including secretarial and clerical assistants, office and miscellaneous school supplies, basic salaries and wages of principals, supervisors, consultants, *teachers,* and librarians. Also included in such costs were instructional material such as textbooks, replacement of library books, and instructional supplies.

There were other costs which were chargeable to appropriated funds but were not chargeable to the per pupil limitation which were generally as follows:

1. *Salaries and wages:*
   a. *Command Staffs and Other Support Personnel.*
   b. *Drivers.*
   c. *Custodial Services.*
2. *Utilities and Services.*
3. *Rental.*
4. *Travel, Overseas Allowances, Government Contributions.*
5. *Equipment (Replacement).*
6. *Supplies.*
7. *Transportation.*[3]

The per pupil limitation was arrived at each year by dividing the average daily membership of each of the schools into the sum of the total obligations and costs men-

---

[3] Department of Defense Instruction No. 1342.5, pp. 6-8, April 10, 1964.

tioned above which were chargeable to appropriated funds and to the per pupil limitation.

The Department of Defense has operated the overseas schools since World War II and up to and including the years involved in these cases under these appropriation acts of the Congress which expressly limited the expenditure of funds for the education of minor dependents of overseas personnel on a per pupil limitation basis as set forth in the appropriation acts.

The Plaintiffs were recruited by the Department of Defense beginning in 1959, to teach in its overseas schools under the system then prevailing as indicated above. Prior to 1960, the plaintiffs were employed as teachers at the grade of GS-7 under the Classification Act of 1949, 5 U.S.C. §§ 1071-1174 (1964). Each of the plaintiffs was employed for a school year and his or her rate of pay was computed on the basis of the annual rate provided by the applicable schedule of the classification act, but only for the school year period for which they were employed. The computation procedure set up for this purpose is listed in Section 944 of the Federal Employees Pay Act of 1945, 5 U.S.C. §§ 901-58 (1964). There was a great deal of dissatisfaction among the teachers under this system because they were only paid for nine or ten-twelfths of the year since they did not work the entire year. This required them to be placed on a nonpay status during recess periods such as Thanksgiving, Christmas, Easter, and during the summer vacations. These problems, among others, caused the Congress to enact Public Law 86-91 which removed all teachers, including the plaintiffs, from the Classification Act of 1949, *supra,* the Federal Employees Pay Act of 1945, *supra,* and the Annual and Sick Leave Act of 1951, 5 U.S.C. §§ 2061-71 (1964), and provided a new system for the appointment of teachers, conditions of employment, rates of basic compensation, length of school years, quarters allowances, and various other entitlements. It

became law in July 17, 1959. The pertinent parts of Public Law 86-91 are as follows:

§ 2352. Regulations of Secretary of Defense

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

* * * * *

§2353. Administration.

(a) Employment and salary practices.

The secretary of each military department in the Department of Defense shall conduct the employment

and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, * * *

(b) * * * the secretary of each military department—

* * * * *

(2) shall establish the appropriate annual salary rate in accordance with this chapter for each such position and individual to which * * * determined to be applicable.

(c) Rates of basic compensation

The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

As previously set out, Section 2352 of Public Law 86-91 required the Secretary of Defense to prescribe and issue regulations to carry out the purposes of the Act. In order to issue such regulations, a series of meetings was arranged between the Department of Defense and the Overseas Education Association and the National Education Association which resulted in the promulgation of what was known as "Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I." These procedures provided for an annual review of the compensation schedules with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. This was because most of the teachers were recruited from urban areas with a population of 100,000 or more. The procedures thus established

were keyed to the per pupil limitation established by Congress. For instance, it was provided that:

> 3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*
>
> *Comment:* It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents school. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.
>
> * * * * *
>
> 5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*
>
> *Comment 1:* It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation [Emphasis in original.] [Salary Determination Procedures, Overseas Dependents School

Teaching Positions Class I, Department of Defense, August 31, 1960.]

Pursuant to these salary determination procedures, compensation was adjusted upward for the year 1960, from $150 to $185 per step so as to approximate the average increment to be in effect in school jurisdictions in the United States with a population of at least 100,000.

Each year subsequent to 1960, the Department of Defense requested that the Congress increase the per pupil limitation so that salaries of teachers might likewise be increased. The Congress was thus apprised that the salaries of teachers were directly connected with the per pupil limitation. It appears that the Congress, in fixing the per pupil limitation for each of the years involved, considered not only the salaries paid to the teachers, but also fringe benefits available to them overseas that were not enjoyed by teachers holding similar positions in the United States.

In 1961, a $10 increase was requested by the Department of Defense of Congress so that a $200 increase in salary might be made for teachers, but the request was denied. For the school year 1962-63, $10 was requested so that salaries might be raised $190, but only $5 was granted and the contemplated raise was not given. For the school year 1963-64, $5 was requested and granted and accordingly the $100 raise was given to teachers as planned. However, for the school year 1964-65, a $10 increase was requested so that teachers salaries might be raised $200, but it was denied and the raise was not possible. For school year 1965-66, the entire per pupil limitation system was changed to include all costs of the overseas schools including $11 to allow an increase of $300 in the salaries of the teachers. The request of $445 per pupil was granted and the $300 raise was given to the teachers. In 1966, Public Law 86-91 was amended so as to provide that salaries for overseas teachers would *be equal* to the salaries of teachers in comparable positions in school districts in the United States

having a population of 100,000 or more.[4] This law became effective on the first day of the first pay period after the enactment of the Act and accordingly was placed into effect by the Department of Defense promptly after April 14, 1966. Consequently, there has been no problem with respect to overseas teachers' salaries since the passage of the amendment in 1966.

The plaintiffs allege that they were not paid salaries as overseas teachers in accordance with the provisions of this Act. They have filed these suits to be recompensed for the difference between what was actually paid to them and the amount which they claim is owned to them pursuant to Public Law 86-91. It is undisputed that all of the plaintiffs were paid the salaries which they were promised at the time they were recruited.

More particularly, the plaintiffs contend that Public Law 86-91 required the secretary of each military department to fix the salaries of teachers in his department so that they would be *equal* to the salaries paid to teachers in similar positions in schools located in the District of Columbia.[5]

---

[4] Public Law 83-391, effective April 14, 1966, provided as follows:

"5 U.S.C. 2352(a)(2) is amended to read as follows:

"(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population;".

"* * * 5 U.S.C. 2353(c) is amended to read as follows:

"(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."

[5] Plaintiff, in No. 93-65, contends that he should have been paid a salary equal to the salaries paid to teachers occupying similar positions in Puerto Rico and Panama.

They offer the alternative argument that the Congress fixed their salaries by Public Law 86-91 at rates *equal* to those paid teachers in similar positions in schools located in the United States, but not to exceed the highest salaries for comparable positions in the District of Columbia.

In either event, their position is quite clear—that since the standard set out is one of equality, their salaries must be continuously readjusted to reflect fluctuations in salaries paid to teachers occupying similar positions in the United States.

They claim that the Secretary of Defense had no discretion except to pay the salaries as fixed by the Congress in the Act, and that continuing readjustment was mandatory without regard to the per pupil limitation contained in the appropriation acts of the Congress during the years that are relevant here.

The defendant responds with two contentions either of which, it asserts, bars recovery. First, that the Act in no way requires continuing readjustments in salary rates absent prior congressional approval and in fact there were no funds to pay the salaries now claimed. Second, assuming *arguendo,* that the Congress had established a specific mandatory statutory rate, the fixing of annual expenditure ceilings via the per pupil limitation resulted in an implied repeal of any obligation Public Law 86-91 is said to have created.

Plaintiffs naturally take the position that there was no implied repeal and allege that during each of the years involved in this case there was a balance of unobligated funds remaining on hand for the Department of Defense in a sufficient amount to have paid the plaintiffs the salaries which they claim they were entitled to under Public Law 86-91. Further, assuming for the sake of argument that there was a failure or exhaustion of appropriation, plaintiffs argue that this would not affect their right to secure the additional earnings.

Finally, the plaintiffs in No. 83-65, press a separate claim for the first time in their motion for summary judgment. They urge that they are entitled to additional compensation for their services prior to the effective date of Public Law 86-91 when the Classification Act of 1949, *supra,* was applicable to them. The claim embraces compensation for the various periods during which they were placed on a leave without pay status.

Once unravelled, the present conflict almost wholly involves the proper interpretation to be placed upon Public Law 86-91.

In the first place, the plaintiffs have construed the words "in relation to" to Section 2353(c) of the Act to mean "equal to" salaries of teachers occupying comparable positions in schools located *in the District of Columbia.* In order to resolve this matter of interpretation of the Act, we must look to the statute itself.

While we recognize that courts can go beyond the language contained in a statute to ascertain its meaning, they should be careful in departing from the statutory terms. To the extent possible, violence should not ordinarily be done to the words chosen by the Congress. *Flora* v. *United States,* 357 U.S. 63, 65 (1958), *aff'd on rehearing,* 362 U.S. 145 (1960); *Thermo King Corp.* v. *United States,* 173 Ct. Cl. 860, 868, 354 F. 2d 242, 246 (1965).

To accept the plaintiffs' contention that the salaries were to be equal to those in the District of Columbia, would accord little, if any, significance to the prohibition against fixing salaries in excess of those paid to District of Columbia teachers. Moreover, the standard, plainly set out in the statute, of comparing the overseas rates of basic compensation with those prevailing in the United States for comparable positions would be rendered meaningless.

It is a cardinal principle of statutory construction to give effect to every clause, sentence and word of a statute,

if possible, rather than to distort the language so as to defeat the plain intent of the Congress. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *United States* v. *Alpers*, 338 U.S. 680, 681-82 (1950); *Johnston* v. *United States*, 163 Ct. Cl. 375, 380 (1963); *Drier* v. *United States*, 108 Ct. Cl. 487, 494, 70 F. Supp. 888, 892 (1947). When this is done with respect to Public Law 86-91, it is clear that it nowhere fixes the salaries of overseas teachers equal to the salaries of teachers occupying comparable positions in the District of Columbia. To place such a construction upon the Act, we would be required to read into it words which are not there. We therefore reject the plaintiffs' first contention.

Secondly, we must examine whether the Act required rates of basic compensation to be equal to those paid teachers in similar positions in schools located *throughout the United States.*

Aside from the fact that such an interpretation of the Act would prove unworkable under the plaintiffs' theory that the secretary was not clothed with discretion to fix salaries, plaintiffs face and cannot overcome the same obstacles which caused us to discard their first argument—that is—their view reads words into the Act and leaves words and sentences contained therein without purpose.[6]

It is also clear that the Congress merely set the boundaries of the program allowing the Secretary of Defense to fill in the details. Nowhere did Congress fix salaries in Public Law 86-91, nor did it define the positions which were to be looked to in the United States as similar to those occupied by the overseas teachers.

---

[6] The legislative history referred to by the plaintiffs in their brief does not support their positions. The strongest language contained in the hearings and committee reports do no more than reflect the language contained in the Act itself. See *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service*, 86th Cong., 1st Sess. 5-7, 24 (1959); H.R. REP. No. 357, 86th Cong., 1st Sess. 4-5 (1959).

That the Secretary was vested with discretion to issue regulations governing the fixing of rates of basic compensation follows unmistakably from the grant of authority contained in Section 2352(a)(2) of the Act.

Also relevant in this vein is the fact that there was no line item for teachers' salaries or for any other specific expense of the overseas schools in any of the appropriation acts of the Congress. The funds for such schools were appropriated in a lump sum subject to the per pupil limitation and the Department of Defense was authorized to disburse the funds for the various costs and expenses of the schools within the per pupil limitation contained in each appropriation act. Plaintiffs' recognition that no portion of the appropriated funds were earmarked points up all the more the administrative discretion in discerning relative needs and priorities.

While the issue of executive discretion has been determined by the foregoing analysis, it is pertinent to note that some of the plaintiffs in No. 267-65, were denied a writ of mandamus to compel the Secretary of Defense to grant pay raises under Public Low 86-91. *Mitchell* v. *McNamara,* 352 F. 2d 700 (D.C. Cir. 1965). It was said that:

> * * * courts will not interfere with the exercise of executive discretion in situations as confused and difficult as the present. [*Supra* at 701.]

This is persuasive authority for the position we take today. See *United States* v. *Shimer,* 367 U.S. 374, 381-82 (1961); *Fix* v. *United States,* Ct. Cl. No. 323-60, decided November 10, 1966, slip op. pp. 6-7, 368 F. 2d 609, 614.

Having decided that a standard of equality was not prescribed by the Congress and, furthermore, that the Secretary of Defense was clothed with discretionary powers, we turn our attention to the regulations promulgated by him under the Act and an ascertainment of whether plaintiffs' salaries were to be continuously ad-

justed in accordance with increments given to teachers serving in similar positions in the United States as defined in the regulations, independent of the appropriation authorized.

Although resolution of this issue is not assisted by the most careful reading of the statute, a thorough search of the legislative history of Public Law 86-91 and its attendant circumstances leads to the conclusion that the plaintiffs' position cannot be sustained.

During the hearings on Public Law 86-91, it was estimated that the proposed legislation would cost only an additional $270,000 per year and that this was due to the fact that an increment was planned for teachers with higher qualifications. This view was concurred in by the teachers' representative, Miss Mary Hoague, who also rejected the thought that the leglislation was to be a pay raise measure. *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess., 17, 37, 41-2 (1959).

These considerations were accepted by the Congress as illustrated by the following excerpt from H.R. REP. No. 357, 86th Cong., 1st Sess. 3 (1959):

* * * * *

COST

The Department of Defense estimates that enactment of this legislation will result in increased costs in the approximate amount of $270,000 per annum for operation of the dependents schools in oversea areas. The major part of this additional cost will be incurred by reason of additional compensation allowed certain teachers in recognition of advanced degrees and teaching experience.

* * * * *

Had Congress sought to disclose an intent to create a mandate for continuing automatic pay adjustments

divorced from legislative control, it certainly would not have limited its consideration to increments concerned solely with higher qualifications.

In addition, it will be recalled that the Secretary of Defense issued regulations after consultation with representatives of the Overseas Education Association and the National Education Association calling for an annual salary review with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Furthermore, as previously indicated, these procedures were explicitly made subject to the per pupil limitation and transmitted to the interested parties.[7]

That the various education associations were advised of the effect of the per pupil limitation contained in the various appropriation acts is amply demonstrated by the following statements they made before the Senate:

> Last August our Overseas Education Association, the National Education Association and the Department of Defense agreed upon the "Department of Defense Salary Determination Procedures," which provides for an annual review and adjustment of overseas teachers' salaries in conformity to the average of stateside districts having 100,000 or more in population. We value this decision highly, and at the same time recognize that the adjustment of our salaries is dependent upon the per pupil money allotment voted by the Congress. [*Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations,* 87th Cong., 1st Sess. 1054 (1962).]

---

[7] Other regulations promulgated by the Secretary of Defense also made reference to the per pupil limitation. See Department of Defense Instruction No. 1342.5, October 28, 1957; Department of Defense Instruction No. 1342.5, April 10, 1964. (The latter instruction cancelled the instruction dated October 28, 1957.)

Also, it was stated in even a later year:

> This unhealthy salary situation, recognized by DOD's own report, is the direct result of a per-pupil limitation . The limitation limits salaries. It limits the amount of money which may be spent for textbooks, library books, and tuitions, but since most of the money appropriated goes into salaries, it is salaries which are in turn most limited. [*Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations,* 88th Cong., 1st Sess. 1456 (1964).]

At this juncture we have the situation where there was not even the slightest suggestion or intimation by the Congress that Public Law 86-91 required constant adjustment of teachers' salaries, where the Secretary of Defense implemented the statute under specific monetary ceilings, and where the persons affected were mindful of this interpretation and, at least, to some extent acquiesced in it.

These circumstances call for application of the rule that administrative practice consistent and generally unchallenged "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933). Accord, *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), *rehearing denied,* 380 U.S. 989 (1965), *Power Reactor Development Co.* v. *International Union of Electrical Radio & Machine Workers,* 367 U.S. 396, 408 (1961). See *Iran Nat'l Airlines Corp.* v. *United States,* 175 Ct. Cl. 504, —, 360 F. 2d 640, 643 (1966); *H. B. Zachry Co.* v. *United States,* 170 Ct. Cl. 115, 125, 344 F. 2d 352, 358-59 (1965); *Schellfeffer* v. *United States,* 170 Ct. Cl. 178, 187, 343 F. 2d 936, 942 (1965). We accept this administrative interpretation as correct.

Fortifying this result even further is the fact that at hearings on appropriations for the overseas school pro-

gram for the years in question, the Congress was continually made aware of the interpretation placed upon the Act by the Secretary of Defense.[8] This supports "the natural presumption that Congress, in its subsequent actions, accepted them as legitimate interpretations." *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954); *Power Reactor Development Co., supra,* at 408-09. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 319 (1958).

This legislative history of Public Law 86-91 supports and adds emphasis to the conclusions we have already reached that the Act did not fix the salaries of overseas teachers equal to those in comparable positions in the District of

---

[8] The plaintiff seeks to make much of the fact that the Department of Defense never sought supplemental appropriations to meet the salary demands of the plaintiffs. It is a fact, however, that the Department of Defense requested an increase in the per pupil limitation for every fiscal year bearing upon the subject matter in these suits so that teachers' salaries could be raised. See *Hearings on H.R. 11998 Before the Subcommittee of the Senate Committee on Appropriations,* 86th Cong., 2d Sess., pt. 2, 1415 (1961); *Hearings Before the Subcommittee of the House Committee on Appropriations,* 87th Cong., 1st Sess., pt. 6, 138-39 (1962); *Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations,* 87th Cong., 1st Sess. 1143 (1962); *Hearings Before the Subcommittee of the House Committee on Appropriations,* 87th Cong., 2d Sess., pt. 3, pp. 718-22, pt. 6, p. 77 (1963); *Hearings on H.R. 11289 Before the Subcommittee of the Senate Committee on Appropriations,* 87th Cong., 2d Sess. 719-20 (1963); *Hearings Before the Subcommittee of the House Committee on Appropriations,* 88th Cong., 1st Sess., pt. 4, 49, 982, 998-99 (1964); *Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations,* 88th Cong., 1st Sess. 213 (1964); *Hearings Before the Subcommittee of the House Committee on Appropriations,* 88th Cong., 2d Sess., pt. 2, 633-50 (1965); *Hearings on H.R. 10939 Before the Subcommittee of the Senate Committee on Appropriations,* 88th Cong., 2d Sess., pt. 2, 532-34, 764-66 (1965); *Hearings Before the Subcommittee of the House Committee on Appropriations,* 89th Cong., 1st Sess., pt. 5, 580-602, 681-722 (1966); *Hearings on H.R. 9221 Before the Subcommittee of the Senate Committee on Appropriations,* 89th Cong., 1st Sess., pt. 2, 554-55 (1966).

Columbia or throughout the United States. Furthermore, it shows unmistakably that such salaries were keyed to the per pupil limitations contained in the appropriation acts of the Congress and were to be fixed within such limitation in the discretion of the Secretary of Defense.

The plaintiffs fashion the argument, however, that since the 1966 amendment to Public Law 86-91 provides that salaries for overseas teachers would be equal to the salaries of teachers in comparable positions in school districts in the United States having a population of 100,000 or more, this is a positive expression of the intent that Congress had in enacting the original legislation in 1959.

While undoubtedly both the plaintiffs and defendant could select choice bits of legislative history to support their views as to the effect of the 1966 amendment, we are of the opinion that it is hazardous business to resort to that legislative history in ascertaining the intent underlying the passage of Public Law 86-91. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 348-49 (1963) and cases collected therein.

Moreover, it is arguable that Congress, as shown by its continued acquiescence, accepted the interpretation of the Department of Defense and recognized the need for the 1966 amendment if a different result was desired.

Plaintiffs, however, place great emphasis on the assertion that the Department of Defense had unobligated funds from which these salary claims could have been paid.

Since we have recognized that increments to teachers' salaries were limited by the congressional appropriations as set forth each year in the per pupil limitation, suffice it to say that the Department of Defense would have no authority to expend funds except for the purposes for which an appropriation was made. See *Norcross* v. *United States,* 142 Ct. Cl. 763 (1958); *Norcross* v. *United States,* 142 Ct. Cl. 767 (1958); *Lovett* v. *United States,* 104 Ct. Cl. 557,

66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946); *Maiatico* v. *United States,* 302 F. 2d 880 (D.C. Cir. 1962); 21 Ops. Att'y Gen. 414, 415 (1896); 34 Ops. Comp. Gen. 599, 600 (1955).

Since it is uncontroverted that there were no funds remaining within the confines of the per pupil limitation with which the salaries claimed could have been satisfied and that no abuse of discretion has been shown in the disbursement of those funds by the agency, we conclude that the plaintiffs have shown no basis for recovery under Public Law 86-91. See *United States* v. *Shimer, supra.*

In view of our disposition of the case thus far, it is unnecessary to consider the other issues raised by the parties concerning Public Law 86-91.

The determination of one further issue, however, is necessary to a complete disposition of this case. That is the claim based upon the Classification Act of 1949, *supra.*

Inasmuch as this claim was not pleaded in the petition in No. 83-65, filed on March 18, 1965, nor was an amendment sought as provided in our Rule 22, it is not properly before the court at this time and cannot be considered.

Accordingly, defendant's cross motion for summary judgment is granted, plaintiffs' motions for summary judgment are denied, and plaintiffs' petitions are dismissed.

Nichols, *Judge,* dissenting:

With all respect, I am unable to agree with the decision of the majority in this case.

I start with the language of the controlling statute, 5 U.S.C. 2353(c), which at pertinent times (July 1959 to the institution of this action in March 1965) read as follows:

> *Rates of Basic Compensation.*
>
> The Secretary of each military department shall fix the rates of basic compensation of teachers and teach-

ing positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

Before going into the complications arising from events subsequent to enactment, it is well to consider what this means, taken on its face alone. Plaintiff says "in relation to" means "equal to" which of course would make interpretation easy. Webster's Unabridged Dictionary (1953 ed.) says that in the phrase "in relation to" the word "relation" means "reference" or "respect." I think a fair interpretation is that the Secretary is to "refer" to stateside salaries in the sense that a mariner might "refer" to a chart. The chart does not tell the mariner where to go but it tells him how to find his destination and the location of shoals he is to avoid. He would be guilty of misconduct if he ignored what the chart told him. I think the Secretary was to ascertain stateside salaries and, in light of his findings, was to fix compensation that was at least comparable. Otherwise why refer to them? He was clearly not to ignore stateside salaries and fix basic compensation out of all "relation" to them, which I find to be what he did, as is admitted in defendant's statement, paragraph 16(a). This appears to be a typical case of a proper delegation of legislative authority, with guidelines. *J. W. Hampton & Co.* v. *United States,* 276 U.S. 394 (1928) (authority to raise customs duties to "equalize" cost of production). Delegation of uncontrolled discretion, or discretion without guidelines would be of doubtful constitutionality and we are not to presume the Congress intended it. *Cochnower* v. *United States,* 248 U.S. 405 (1919).

The defendant knows what "in relation to" means, whether or not the court does. It says (original brief, p. 28):

> Thus, from the date that the salary provisions of Public Law 86-91 were implemented, in January of 1960, throughout the school year ending in June of 1961, teachers were compensated pursuant to a pay schedule fixed by the Department of Defense *in relation to* school districts in the United States having a population of 100,000 or more. * * * (Emphasis supplied.)

It makes no such claim for any later year in this litigation. Evidently, to it, the statutory language set a clear and specific guideline which it conformed to up to June 1961, and not afterwards. At page 31 of the original brief it says:

> Thus, for the school year 1961-1962 the rates paid were admittedly lower than those which would have been paid had the rates been adjusted to conform to the average of districts * * * .

And so it went.

Assume then, the Secretary had not the apparently impossible task of determining an exactly "equal" compensation, but of finding one that was "in relation," he could have exercised his authority validly to select any figure within a range. If budgetary considerations had led him to prefer the lower side of the range, his choice would not have been subject to challenge in court. But here he made a two step determination. In every year after 1961, he selected a figure that he found was "in relation," and then afterwards he cut it substantially to meet his budget exigencies. This procedure seems to me in a manner to say to the teachers involved, to the Congress, and to this court, that the final figures were not "in relation" and were out

of "relation" to the statutory guidelines, by amounts furnished to the Congressional Committees.

It is conceded, as it must be, that he could not cut a statutory salary to avoid incurring a budget deficiency, or at least, if he did, the difference would be recoverable in this court. *United States* v. *Langston,* 118 U.S. 389 (1886). See the long line of cases cited, *Lovett* v. *United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946).

Defendant repeatedly states the proponents of the bill denied it would raise wages. This was apparently true under any interpretation for the immediate future, and for the years that were then more remote, of course no one could have said what would occur. Defendant also says the law did not create a "mandate for continuing automatic pay adjustments." It apparently does not mean, as one might at first think, that the statute froze wages at their then rates. The Secretary did in fact adjust them annually. What the court might do if he had made no determinations but had elected to leave existing scales in effect is not before us and we need not consider what, in that event, plaintiffs' remedies would have been.

If, for fear of a budget deficiency, the salary is set below the range the guidelines permit, the situation is the same as if a fixed salary were cut. If the Secretary had not made his determination, within the guidelines, and then cut it, there might be some question as to the measure of damages, but here he has solved that problem for us, at least sufficiently for the purposes of a dissenting opinion.

Now, I turn to the subsequent events that are supposed to make a difference. It appears that when 5 U.S.C. 2353 (c) became law, as for some time before, the Congress had been accustomed to prescribe in the annual Department of Defense appropriation a per pupil limitation (hereinafter, as in the briefs, PPL) which limited the availability of funds for overseas dependent's schools, including teacher's

salaries and certain overhead items in Government schools, and charges in tuition-fee schools not operated by the Department of Defense, to a stated amount per pupil. Soon upon the enactment of 5 U.S.C. 2353(c) the Department took the position that if the PPL came into any conflict with the new standard, it would prevail, that is, statutory salaries would have to be cut to meet the PPL. In presenting its annual appropriation requests, the Department made it clear to the Appropriations Committees that the PPL would have to be lifted if the statutory standard were to be met, and by implication, that it was being treated as controlling *pro tanto* the statutory provision. Nevertheless, the PPL was not raised, or not enough. The Department came to fix the salaries tentatively only, and then to cut them when the appropriation bill was law and the PPL therefore known.

Are the PPL provisions to be treated as amending annually the provisions of 5 U.S.C. 2353(c)? The answer seems clearly no. Normally, limitations in appropriations do not "reach to this court." *Lovett* v. *United States, supra.* On their faces, moreover, they could stand together and both be given effect. The teachers apparently could have been allowed their statutory pay and the PPL also observed, by increasing the size of classes, cutting overhead, or otherwise. The only time the Appropriations Committees mentioned the apparent conflict, it said in substance that the PPL could be observed and teachers be given their justified increases if certain economies were effected. House Report 1607, 87th Cong., 2d Sess. It may well be that as a practical matter, the full salaries could not be paid within the PPL's, but this depended on information the Congress may not have accepted as true. A statute is not readily to be taken as repealing by implication another which it does not designate expressly for repeal. *United States* v. *Langston, supra.* Defendant also refers to the Anti-Deficiency Act, 31 U.S.C. 665, but this

would not be binding on this court, whose judgments are separately funded.

If the Congress adverted to the possibility that the PPL's were construed as denying the teachers their legal rights, it may have intended that they be tested in this court.

Nor are these subsequent proceedings to be treated as subsequent legislative history bearing on the interpretation of 5 U.S.C. 2353(c). We would have to find the statute ambiguous, which in my view it hardly is. A declaration by the Congress itself what a former Congress meant would not be more than persuasive, depending on circumstances. *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958). That declaration not only did the Congress not give, but the Appropriations Committees did not. It was very careful to leave the statutory construction here involved to stand on the authority of the Department of Defense alone. Indeed, to have complained that the Department of Defense was being too careful with appropriated funds would, for an appropriations committee, have been a case of man biting dog. The Congress must know of a statutory construction before it can ratify it. We are not always obliged to suppose a Congress knows what a committee has been told, especially when, as here, the committee is not the one that reported the statute to be interpreted. When the Committees on Civil Service of the House and Senate learned of the interpretation here involved, they repudiated it emphatically. In Rep. No. 951, 89th Cong., 2d Sess., the Senate Committee said the law had "never been administered in the manner which Congress intended."

The strongest argument for the defendant derives, in my view, from the interpretation which the Department of Defense adopted upon enactment of the statute to be construed. Undoubtedly, in view of their sponsorship of the legislation and the work with the committees they must have done, there could have been unrecorded or unpublished legislative history leading their officials to construe

the legislation as they did. To me, however, such contemporaneous official interpretation is a better guide when it is uncoerced. The predicament an official of the executive branch is placed in, when in a squeeze between law and appropriation limitations, is something we should regard with realism, if with sympathy too. To keep his program going, which he may well regard as his primary duty, he may adopt an interpretation of law which under other circumstances he would consider untenable. Of course, the issue was academic as long as the PPL did not force the teachers' pay out of "relation." When it did, the Department might well have feared that to insist on the statutory pay levels would throw the overseas dependent's schools into chaos. To insist on the teachers' statutory rights might have denied another right, and denied it beyond all reparation by the courts; the right of those who serve their country overseas to have their children educated as they would be at home. The facts, of course, do not establish that the interpretation here involved was made under duress, but there seems to me a substantial possibility that it was. Actual inquiry as to this would be difficult and perhaps unwholesome, but I would apply with hesitation the whole concept of a contemporaneous administrative interpretation when the interpretation at issue appears to have been necessary for budgetary reasons or might have been supposed to be so necessary.

In *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 343 F. 2d 936 (1965), this court took the view that it would hesitate to overturn a consistent administrative interpretation of a statute, particularly when to do so would impose on the United States a large financial burden. Sound in its then context, such a course is misapplied when the administrative interpretation involved is shown to have been itself based on budgetary considerations. It would then be tantamount to saying a debtor is exonerated from paying by his consistent and long-established opposition to paying. If the Government should benefit from such a doctrine, it

would hardly have put itself in the position of a private litigant, who would probably be jailed for contempt if he interposed such a defense. The Government here was on notice that its interpretation of the statute was challenged, as it does not deny, and it continued to adhere to its position, without doing anything to clear the matter up. To my way of thinking, a long-continued administrative practice is on a different footing when it has ignored an equally long-continued challenge to its legality, and in that event it awaits the event of judicial determination without influencing it in any way.

Defendant's whole handling of this case has an odd flavor I find it hard to give a name to. They are stuck with their position. They must do their best to defend it, as they do. Yet, if plaintiffs should prevail, I cannot picture the Pentagon being draped in black. The exigencies of Government as it is practiced force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in. If an institution less august than the Department of Defense were involved, I would call its role in this litigation ignominious.

This dissent does not apply to any claim by plaintiffs for salary earned before June 30, 1961, or for any salary earned thereafter in excess of the difference between the amounts paid and the amounts determined by the Department of Defense "in relation to" certain stateside salaries, as acknowledged in its briefs and other filings.

DURFEE, *Judge,* joins in the foregoing dissenting opinion.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–5a) is reported at 306 F. Supp. 317. The *per curiam* opinion of the court of appeals (Pet. App. 6a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1971. The petition for a writ of certiorari was filed on March 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 5 U.S.C. 2353(c) required the Secretary of Defense to fix salaries for teachers of minor dependents of military personnel abroad at rates equal

421-037—71

to the rates of basic compensation for similar positions in the United States.

STATUTE INVOLVED

The relevant provisions of the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.*, are set forth at Pet. App. 7a–17a.

STATEMENT

Petitioners are teachers presently or formerly employed in the school system maintained by the Defense Department for the education of the minor dependents of military personnel abroad. In this suit for back pay for the years 1960 through 1966, petitioners [1] contend that the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.*,[2] required the Secretary of Defense to adjust the compensation of overseas teachers to the level of salaries paid for similar work in this country.

The Act authorized the Secretary of each military department, subject to regulations promulgated by the Secretary of Defense, to fix compensation for overseas teaching positions "in relation to the rates

[1] This suit was instituted on behalf of the individual named plaintiffs and all other overseas teachers similarly situated except those whose rights were adjudicated in a virtually identical suit brought in the United States Court of Claims, *Crawford* v. *United States*, 376 F. 2d 266, certiorari denied, 389 U.S. 1041 (Pet. App. 29a–55a).

[2] This Act was, as discussed *infra*, substantially amended in 1966, and in its present form is codified as 20 U.S.C. (Supp. V) 901 *et seq.*

of basic compensation for similar positions in the United States," 5 U.S.C. 2353(c). The Secretary of Defense interpreted this language as requiring any salary scale to meet the limitations provided by the ceiling on funds that might be expended on education of dependents. This so-called "per pupil limitation," which was routinely inserted in defense appropriation bills both before and after the 1959 Act, fixed the maximum average amount that could be expended for educational services in connection with each dependent.

In 1960, the first year of operation under the Act, the teachers' salaries fixed by the Secretary were generally commensurate with those paid in the United States. Thereafter, while teaching salaries in this country increased, the Department of Defense each year requested increases in the "per pupil limitation" to allow for raises for overseas teachers. Congress, however, declined to appropriate funds sufficient to permit the overseas teachers' salaries to keep pace.

In 1966, the Act was amended. Congress deleted the language authorizing the Secretary to prescribe regulations fixing the compensation for overseas teachers "in relation to" salaries in this country and substituted a direction that the Secretary prescribe regulations providing for:

> (2) the fixing of basic compensation for teachers and teaching positions at rates *equal to* the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of

> 100,000 or more population [80 Stat. 117, 20 U.S.C. (Supp. V) 902(a)(2) (emphasis supplied)].

This amendment, however, was expressly given only prospective application (80 Stat. 118).

Relying on the 1959 Act, petitioners seek recovery of the difference between the salaries paid them and what they would have received if their salaries had been "equal to" the earnings of teachers in comparable systems in the United States. On cross motions for summary judgment, the district court ruled in favor of the government (Pet. App. 1a–5a). The court pointed out that the contemporaneous construction of the Act by the Secretary, by Congress, and by petitioners' own representatives (educational associations) reflected awareness that under the Act the Secretary had discretion in setting rates for teachers' salaries and that those rates were subject to limitations in the relevant congressional appropriations (Pet. App. 4a). The court also noted that, upon substantially the same record, the Court of Claims (two judges dissenting) had reached the same conclusions. *Crawford* v. *United States,* 376 F. 2d 266, certiorari denied, 389 U.S. 1041 (Pet. App. 29a–55a).[3] The court

[3] Prior to both the present suit and *Crawford*, the Overseas Education Association brought a class action for mandamus against the Secretary of Defense, presenting the same contentions made here and in *Crawford*, that is, that the Act required the Secretary to raise and to maintain overseas teachers' salaries at levels equal to those prevailing in the United States. The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the action on the ground, among

of appeals affirmed on the opinion of the district court (Pet. App. 6a).

ARGUMENT

The decision of the courts below is correct, in accord with the only other decisions interpreting the provision in question, and of no prospective importance. Moreover, the issues presented are the same as those in *Crawford* v. *United States, supra,* where certiorari was denied, 389 U.S. 1041. Review by this Court is therefore not warranted.

1. In support of their contention that they were underpaid, petitioners point to 5 U.S.C. 2353(c), which provided in pertinent part that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department *in relation to* the rates of basic compensation for similar positions in the United States * * *. [Emphasis supplied.]

But the statute was cast in discretionary, not mandatory terms. The Act said pay scales shall be fixed "in relation to" domestic levels, and in ordinary usage this standard includes more flexibility than the "equal to" requirement petitioners would read into the statute. Nowhere was there any reference to mandatory periodic review and adjustment of salaries once fixed initially.

The history of the legislation explains why. As the district court recognized (Pet. App. 1a–2a), this legis-

---

others, that fixing appropriate levels of teachers' pay was a matter the Act committed to executive discretion. *Mitchell* v. *McNamara*, 352 F. 2d 700.

lation was enacted because the conditions peculiar to school teaching (long summer vacations and holiday recess periods) could not easily be accommodated within the framework of the pay and leave statutes covering regular government employment. It was to eliminate the hardships caused by applying those statutes to teaching positions that Congress legislated in 1959.[4] The statutes generally regulating the pay of federal civil servants at that time contained no provisions for mandatory increases in federal salaries to reflect a rise in comparable non-federal salaries. Consistent with these statutes, nowhere in the committee reports or in the floor debates on the legislation here involved was there any suggestion that the legislation—enacted as a substitute for the regular legislation governing the conditions of federal employment—would entail such an automatic pay raise feature and confer preferred status on overseas teachers. On the contrary, the statute was enacted after Congress heard representatives of the overseas teachers themselves state that this legislation was not intended as a pay-raise measure (Hearings on H.R. 1871 and related bills before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., pp. 41–42 (1959)).

The district court accurately observed (Pet. App. 3a–4a) that the Secretary's interpretation of the Act, made at the time of its passage and continu-

[4] See H. Rep. No. 357, 86th Cong., 1st Sess.; S. Rep. No. 141, 86th Cong., 1st Sess.

ously asserted before Congress and with the teachers, was that his authority to raise the pay of overseas teachers was contingent upon adequate congressional appropriations, that is, increases in the "per pupil limitations" on overseas school expenditures in the annual Defense Department appropriation bills. As the court noted (Pet. App. 3a), there is no permanent legislation respecting the overseas school program for military dependents. Authority to operate such schools is contained only in the annual Defense Department appropriation acts. These appropriations consistently limited the funds expendable for such purposes to an average specified amount "per student," and such expenditures historically determined the amounts available for the salaries of overseas teachers.

In this context, the Secretary's interpretation of the Act as authorizing him to raise teachers' salaries only if Congress raised the "per pupil" allotment sufficiently to permit him to do so was entirely reasonable. In some years Congress granted the Secretary's request that the "per pupil limitation" be raised so that teachers' salaries could be increased, and in other years Congress refused (Pet. App. 18a, 31a, 46a, n. 8). Not only was the administrative interpretation repeatedly brought to the attention of Congress,[5] but petitioners' own representatives also advised Congress of their similar understanding and in each appropriation bill Congress acted on the basis

[5] See *Crawford* v. *United States*, *supra*, 376 F. 2d at 275, n. 8, and Pet. App. 46a, n. 8.

of that understanding.[6] *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408–410; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318–319.

2. The ruling below does not conflict with any other decision. On the contrary, it is in complete accord with rulings of the Court of Claims in *Crawford* v. *United States*, 376 F. 2d 266, certiorari denied, 389 U.S. 1041, and the Court of Appeals for the District of Columbia Circuit in *Mitchell* v. *McNamara*, 352 F. 2d 700.

United States v. *Langston*, 118 U.S. 389, and *United States* v. *Vulte*, 233 U.S. 509, on which petitioners rely, hold only that statutes fixing the salaries of public officers at a "designated sum" are not considered to be abrogated by subsequent acts that appropriate lesser amounts for that officer for given years, unless there is specific language to that effect.[7] Here the Act did not establish specific levels for the

---

[6] See, *e.g.*, Hearings on H.R. 7851, before the Subcommittee of the Senate Committee on Appropriations, 87th Cong., 1st Sess., p. 1054 (1962), and Hearings on H.R. 7179 before the Subcommittee of the Senate Committee on Appropriations, 88th Cong., 1st Sess., p. 1456 (1964), both quoted in the *Crawford* opinion, 376 F. 2d at 274 (Pet. App. 44a–45a).

Congressional acquiescence in the Secretary's interpretation of the Act is apparent from the Senate's refusal to permit the Defense Department to pay for certain items traditionally included in the per pupil allotment out of other funds in order to increase the money available for teachers' salaries. See S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17–18 (1964).

[7] Of course, as the Court has recognized, Congress may repeal substantive legislation in later appropriations measures. *E.g.*, *United States* v. *Dickerson*, 310 U.S. 554; *Belknap* v. *United States*, 150 U.S. 588; *United States* v. *Mitchell*, 109 U.S. 146.

salaries of overseas teachers, and under the Secretary's regulations (Pet. App. 21a–23a) the salaries would not be set administratively until Congress determined the "per pupil limitation." By its consistent refusal to approve Defense Department budgets sufficient to provide for the pay increases petitioners believed to be mandatory, Congress was not repealing earlier substantive legislation. It was simply legislating in accordance with its own and with the Secretary's understanding that the Act made such raises contingent on Congressional approval of expenditures for that purpose. Cf. *Panama Canal Co.* v. *Grace Line, supra.*

3. The question of statutory construction posed by petitioners is not prospectively important. As noted above, in 1966 the Overseas Teachers' Pay Act was amended to direct the service Secretaries in the future to fix basic compensation for overseas teachers "at rates *equal to*" average rates for similar employment in specified urban school districts in this country. 20 U.S.C. (Supp. V) 903(c) (emphasis supplied). Moreover, the issues raised here do not differ from those in *Crawford* v. *United States, supra,* where certiorari was denied, 389 U.S. 1041.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

EARL C. BERGER
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

This Reply is respectfully submitted because the Respondent's Brief In Opposition studiously ignores the vital, principal Question Presented by Petitioners and instead *substitutes* a wholly different Principal Question.

The Principal Question presented by the Petition is:

> "Whether, if both Houses of Congress cannot constitutionally enact legislation segregating creditors of the Federal Government into preferred and secondary creditors, can the Secretary of Defense accomplish this very result by administrative fiat, reducing statutory salaries?"

Whereas the Respondent substitutes an entirely different Question, whether the Secretary of Defense is required to fix salaries for teachers of minor dependents of military personnel at rates *equal* (sic) to the rates of basic compensation for similar positions in the United States. The Respondent's statement of the Question Presented reads:

> "Whether 5 U.S.C. 2352(c) required the Secretary of Defense to fix salaries for teachers of minor dependents of military personnel at rates equal to the rates of basic compensation for similar positions in the United States."

It is important to point out that while other teachers, other than the Petitioners in this case, but who were expressly excluded from this case, prayed for rates equal to the rates prevailing in the United States, in *Crawford et al* v. *United States,* 179 Ct. Cl. 128; 376 F.2d 266 (1967), cert. den. 389 U.S. 1041, Appendix G, Petition, (pp. 29a-55a), which was not a class action, your Petitioners did not ask for rates equal to those in the United States, but for the rates specified in the basic Pay Act, viz, *"in relation to"* stateside rates. (See: Amended Complaint, Para. 7, Appendix on Appeal, p. 11.)

Your Petitioners' claim is based upon the wording of the basic Pay Act, Public Law 86-91, prior to its amendment in 1966 by Public Law 89-391. Prior to such amendment the basis was "in relation to", whereas the 1966 amendment substituted the words "equal to" in place of "in relation to".

In brief, the Petitioners contend, and the record is clear, that the Respondent did not pay rates in relation

to stateside rates, but segregated Petitioners apart from all other creditors, casting them into the category of secondary creditors, on the premise that if the statutory basis were observed and salaries paid in relation to stateside salaries, other school personnel and suppliers could not be paid their statutory entitlements in full. Accordingly, the Secretary selected the teachers to subsidize all other creditors, and the Question presented is whether the Secretary had the power to segregate creditors of the Federal establishment into preferred and secondary creditors based upon alleged budgetary considerations.

If such power exists the Secretary of Defense can discount sergeants' salaries while paying full statutory rates to commissioned officers, on the premise that if he paid sergeants and private soldiers their statutory rates he might not be able to pay all other creditors, suppliers, shipbuilders and others.

The gravamen of Petitioners' complaint is that the Secretary presumably computed teachers' salaries on the basis provided for in the regulation intended to implement the basic Pay Act, which calls for teachers' salaries "in relation to" those in the United States, but after engaging in such hypothetical exercise, the Secretary subtracted whatever sums he saw fit, in his "discretion", in order to achieve a forced, fictitious average cost for schooling each pupil. He selected the teachers to be the victims of his bookkeeping convenience, paying all other creditors their entitlements in full.

The regulation for determining teachers' salaries is set out in full in the Appendix to the within Petition at pp. 20a-23a,—the "Salary Determination Proce-

dures"—and provides that "(1) The compensation schedule will be reviewed annually", and that

> "4. The compensation schedule will be established and adjusted 'in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia".
>
> . . . .
>
> "(a) Comparison for the purpose of establishing the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possibe will be utilized."

No annual Appropriation Act funding the school program refers to teachers' salaries or refers to the Teachers Basic Pay Act, Public Law 86-91, which remained in full force and effect for each of the years in question.

Judge Philip Nichols in the Court of Claims case of *Crawford et al.* v. *United States, supra,* crystallized the situation in his vigorous dissent (see: Appendix E, pp. 50a-51a, this Petition) when he stated:

> "Assume then, the Secretary had not the apparently impossible task of determining an exactly 'equal' compensation, but of finding one that was 'in relation,' he could have exercised his authority validly to select any figure within a range. If budgetary considerations had led him to prefer the lower side of the range, his choice would not have been subject to challenge in court. But here he made a two step determination. In every year after 1961, he selected a figure that he found was

'in relation,' *and then afterwards he cut it substantially to meet his budget exegencies.* This procedure seems to me in a manner to say to the teachers involved, to the Congress, and to this court, that the final figures were not 'in relation' and were out of 'relation' to the statutory guidelines, by amounts furnished to the Congressional Committees. (emphasis supplied)

It is conceded, as it must be, that he could not cut a statutory salary to avoid incurring a budget deficiency, or at least, if he did, the difference would be recoverable in this court. *United States* v. *Langston,* 118 U.S. 389 (1886). See the long line of cases cited, *Lovett* v. *United States,* 104 Ct. Cl. 557,582, 66 G. Supp. 142 (1945), aff'd on other grounds, 328 U.S. 303 (1946).

If, for fear of a budget deficiency, the salary is set below the range the guidelines permit, the situation is the same as if a fixed salary were cut. If the Secretary had not made his determination, within the guidelines, and then cut it, there might be some question as to the measure of damages, but here he has solved that problem for us, at least sufficiently for the purpose of a dissenting opinion."

To quote Judge Nichols' concluding remarks (Appendix E, this Petition, p. 53a):

"Defendant's whole handling of this case has an odd flavor I find it hard to give a name to. They are stuck with their position. They must do their best to defend it, as they do. Yet, if the plaintiffs should prevail, I cannot picture the Pentagon being draped in black. The exigencies of Government as it is practised force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in. If an institution less august than the Department

> of Defense were involved, I would call its role in this litigation ignominious."

As pointed out in the Petition (p. 19), in the case of *New York Airways, Inc.* v. *United States,* 369 F.2d 743 (Ct. Cl. 1966), the statute provided for a subsidy in amounts to be determined by the CAB in accordance with standards set forth in the statute, and when thereafter subsidy payments became exhausted the Government discontinued making such payments on the ground that its liability was limited to amounts appropriated. The Court disagreed:

> "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. . . ."

An important omission from Respondent's Brief in Opposition is its failure to comment on a vitally important factor. It has wholly failed to advise the court *how much it did spend* to operate the schools. Whereas the Respondent keys its justification for segregating teachers into secondary creditors on the premise, of a surmise, that a deficiency would or could result if it paid teachers full statutory salaries, *it cannot tell the court how much it did spend.* Petitioners submitted Interrogatories requesting such information but the Department of Defense answered same by saying that the records establishing costs and expenditures are no longer available. Please refer to these Interrogatories and Answers thereto at pp. 17-18, this Petition.

Thus the issues joined by this unprecedented litigation have resulted in the lower courts' judgment establishing the unwarranted precedent that trustees of public funds need not account for their stewardship

to anyone, and urge this Court to validate this unique contention. If permitted to stand trustee-fiduciaries of public funds need account to no one.

CONCLUSION

The Writ should be granted because:

1. It is vitally important to settle the unique, unprecedented assumption of power of the part of trustees of public funds to segregate creditors of the Federal Government into preferred and secondary creditors.
2. It is extremely important to vitiate administrators' license, established for the first time by the judgment herein, *to not account* for their expenditures of public funds of which they are trustees, and contend that their inability to account for such funds *ipso facto* clothes them with power to amend and repeal basic pay statutes by rhetorical exercises in the form of regulations.
3. The judgment establishes a wholly new precedent judicially sanctioning discrimination between classes of Government civil servants, reducing the statutory salaries of some of them who are prohibited by law from striking.

For the foregoing reasons the Writ should be granted.

Respectfully submitted,

EARL C. BERGER
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Your Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted because other substantial grounds not previously presented, if considered, would suggest to this Court that justice re-

quires a full review in order to settle at least two unique questions which may be stated as follows:

Questions Presented

1. Whether, when the compensation for *all* employees of an authorized program administered by a Government agency, is funded by *one common appropriation,* the officials charged with the duty of paying statutory rates to all employees, have the power or discretion to pay some of the employees their full statutory entitlements and at the same time pay substantially lower rates to other employees.

2. Whether administrators can justify their actions, outlined in Question No. 1, on the premise that they did not think they could pay all employees in full, yet fail to show how much they did have available and how they in fact disbursed available funds.

Discussion

As noted at Appendix 25a-26a to the original Petition, the Agency, the Department of Defense, conceded that it could not account for the funds appropriated for the operation of the Overseas Dependents School program; yet premised its contention that it would substantially discount the teachers' statutory pay rates on an *alleged* lack of funds.

The situation presented is completely unique in the annals of Government and all custom and laws governing employment in private enterprise. Unless corrected the judgment will serve as the basis for adding fuel to the fires of nationwide unrest and dissatisfaction. This disavowal by the Federal Government of its solemn contractual obligations is not only unjust, it is highly dangerous.

Conclusion

For the foregoing reasons a Rehearing should be granted.

Respectfully submitted,

EARL C. BERGER,
Attorney for Petitioners
38 Hamilton Court
Palo Alto, Calif. 94301

Of Counsel:

PARK CHAMBERLAIN
302 Main Street
Los Altos, Calif. 94022

Certificate of Petitioners' Counsel in Support of Petition for Rehearing of Petition for a Writ of Certiorari

I, Earl C. Berger, attorney for the Petitioners herein do certify that the accompanying Petition for Rehearing of the Petition for a Writ of Certiorari is taken in good faith and not for the purpose of delay and that the within Petition is based upon substantial grounds available to Petitioners although not previously presented.

Dated: May 13, 1971

/s/ EARL C. BERGER
Earl C. Berger
Attorney for Petitioners

Supplemental Certificate

Because Petitioners' counsel, undersigned, was in Europe at the time the denial of the Petition for a Writ of Certiorari, and continues to be overseas and is unable to travel to Washington, D.C. in time to append his manuscript signature to the within Petition for a Rehearing, he respectfully requests that his signature to this writing as well as his original signature to his Certificate of good faith be accepted in lieu of same to one of the printed Petitions for Rehearing.

Dated at Geneva, Switzerland, May 13, 1971

/s/ EARL C. BERGER
Earl C. Berger